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IN-DEPTH ANALYSIS

CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

EXPERIENCE AND PERSPECTIVES

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CONTENTS

INTRODUCTION

Constitutional judiciary has been existing in Macedonia for almost six decades. The First Constitutional Court, as a separate constitutional order institution controlling constitutionality of laws and constitutionality and legality of other general legal acts, was introduced with the 1963 Constitution of the Socialist Republic of Macedonia. Its organizational setting, powers and working procedures for exercising its jurisdiction were regulated in detail with a special law. In accordance with its powers, the Constitutional Court exercised additional *a posteriori* or conditional repressive control over the constitutionality of the laws by making decisions that had the legal effect of determining unconstitutionality of a law. Where the Assembly failed to harmonize the law within 6 months, the Constitutional Court would conclude, with a new decision, that such law was abrogated.

The 1974 Constitution of the Socialist Republic of Macedonia and the 1976 Law on the Basis of the Procedure and the Effect of the Decisions of the Constitutional Court introduced minor changes in the jurisdiction of the Court and the legal effect of its decisions, but its position in relation to the legislative and executive power remained unchanged. The Constitutional Court was part of the system of power and was tasked with ensuring internal harmony of the legal order.

The Constitutional Court remained part of the new legal order of the Republic with the 1991 Constitution as well, but now in a position based on democracy, human rights and rule of law.

According to Article 108 of the Constitution, the Constitutional Court of the Republic of North Macedonia is a body of the Republic that protects constitutionality and legality, and thereby the rule of law as a fundamental value of the constitutional order of the Republic. Its position, composition, powers and the legal effect of its decisions are prescribed by the Constitution of the Republic of North Macedonia (RNM), whereas the manner of operation and the procedure before the Constitutional Court are prescribed by the Court, with the Rules of Procedure of the Constitutional Court of RNM. The Constitutional Court, according to its position, is not part of the system of state government. It is a special constitutional body (sui generis) with status, composition, organizational set-up and powers specifically determined by the Constitution. Such independent position of the Constitutional Court is considered a precondition for the smooth performance of the constitutional judicial function, sheltered from political influences.

1

STATUS OF THE CONSTITUTIONAL COURT OF RNM IN THE LEGAL SYSTEM

1.1.

INSTITUTIONAL POSITION OF THE CONSTITUTIONAL COURT

The position of the Constitutional Court of the Republic of North Macedonia (Constitutional Court) was established with the provisions of the 1991 Constitution of the Republic of Macedonia and regulated in detail with the Rules of Procedure of the Constitutional Court adopted by Constitutional Court itself.

According to Article 108 of the Constitution, the Constitutional Court of RNM is a body of the Republic that protects constitutionality and legality.

The Constitutional Court is **independent of the other organs of state government.** In its work, the Constitutional Court is independent from the Assembly, the President of the Republic, the Government and the regular courts.

The Constitutional Court consists of nine judges. It is of particular importance that constitutional judges be independent in their work. Hence, in Article 111, the Constitution provides mechanisms for guaranteeing the independent position of judges against the holders of power in the Republic. The position of the Constitutional Court in the constitutional order of RNM, as established by the Constitution of the Republic and further defined with the Rules of Procedure, allows that the Court be functionally independent.

1.2.

NORMATIVE BASIS FOR REGULATING THE STATUS, THE MANNER OF OPERATION AND THE PROCEDURE BEFORE THE CONSTITUTIONAL COURT

1.2.1. NATURE OF THE RULES OF PROCEDURE

As per the practice of the constitutional courts, the manner of operation and the procedure before the court are governed by law or rules of procedure.

In the region of Southeast Europe, all countries, except Bosnia and Herzegovina and North Macedonia, have a Law on the Constitutional Court.

Article 113 of the Constitution of RNM provides that "the manner of operation and the procedure before the Constitutional Court shall be governed by an act of the Court". The Rules of Procedure of the Constitutional Court were adopted pursuant to this constitutional provision.

In the opinion of some authors, the 1991 Constitution, unlike the previous two constitutions, abandoned the wider constitutional and legal regulation of the manner of operation and the procedure before the Constitutional Court, leaving this matter to be regulated with an **Act of the Constitutional Court**.

In this regard, several aspects need to be clear or clarified.

Firstly, the name "Rules of Procedure of the Constitutional Court" is not the criterion for determining the legal nature, nature and normative validity of that act; the criterion is the power conferred by the Constitution to the Constitutional Court to adopt an act regulating the "manner of operation and the procedure before the Constitutional Court". The "Act" from Article 113 could also be titled otherwise - for example "Rules of the Constitutional Court" or "Rules on the Manner of Operation and the Procedure before the Constitutional Court" (that in effect overlaps in meaning with the expression "Rules of Procedure" and is the usual English translation of "Rules of Court" or "Rules of Procedure". The latter is especially the case with the “Rules of Procedure of the Assembly”).

Secondly, for a general act to be “secondary legislation", its enactment needs to be mandated by law. However, the "Rules of Procedure of the Constitutional Court" are by no means such a “secondary legislation” act. The act of the Constitutional Court and the scope of regulation thereunder, as well as the power of the Constitutional Court to adopt it, are directly governed by the Constitution, without the mediation of a law. In this context, it should be clear that the act of the Constitutional Court on the manner of operation and the procedure, now called "Rules of Procedure", is a general legal act with **autonomous sui generis status** in the constitutional order, and with a clear scope of the regulated matter. Therefore, **it would be contrary to the Constitution to enact a law that would regulate "the manner of operation and procedure before the Constitutional Court."**

Pursuant to the foregoing, it is not difficult to conclude that: in principle, the Rules of Procedure do not lack a constitutional basis and legitimacy to regulate the pertinent issues of the procedure before the Constitutional Court; the type and the legal effect of the decisions of the Constitutional Court are originally regulated by the Constitution; and the Rules of Procedure do not regulate "legal matter" *(except the supplement to the judges’ salary, which of course cannot be part of this act according to Article 113 of the Constitution).*

In addition, transfer of regulation of the procedure before the Constitutional Court from the autonomous act of the Court into a law would open room for influence and some control of the legislator over essential aspects of the functioning of the Constitutional Court, even to the extent of limitation of the legal effect and the effects of its decisions, which is not unknown in the "negative" comparative practice (for example, when limiting the effect of the decisions of the Constitutional Court regarding financial and budgetary issues, etc.). **The current solution seems to provide a solid premise for a high degree of autonomy and independence of the Constitutional Court** in the performance of its powers, which should not be put at risk.

1.3.

STATUS OF CONSTITUTIONAL JUDGES

The independent status of the Constitutional Court is especially evident through the independent position of the Constitutional Judge. Ensuring independent status of a constitutional judge is affected by the following factors: the length of his/her term of office, as determined by the Constitution; impossibility of re-election; incompatibility between the judicial office and the immunity of the judge as a member of the Constitutional Court; and provision of finds and the level of independence in disposing with such funds.

The **status** of Constitutional Court judges is determined by the Constitution of RNM and is regulated in more detail with the Rules of Procedure of the Court.

According to Article 109 and Amendment 15 of the Constitution, judges are elected by the Assembly from the ranks of prominent lawyers, for a term of 9 years, without the right to re-election. Constitutional judges elect the President of the Court from their ranks, which strengthens the independence of the courts.

The members of the Court are proposed by the Assembly, the President of the Republic and the Judicial Council of RNM, under their constitutional powers. It follows from the foregoing that the possibility of influence by a state body or political party is avoided.

Constitutional Court judges are elected from the ranks of prominent lawyers. Introducing this provision into the Constitution of RNM as a selection criterion demonstrates clearly the will of the Constitution maker to reduce political influence in the election of constitutional judges.

The term of office of judges is nine years, without the right to be re-elected. Thus established term of office of the constitutional judges guarantees that one governing structure cannot elect all constitutional judges. Furthermore, the longer term of office of the constitutional judges ensures continuity in the work of the Constitutional Court, and the impossibility of re-election contributes towards strengthening independence of judges in making decisions.

Article 111 of the Constitution clearly determines that the function of a Constitutional Court judge is a depoliticized one and not compatible with other public functions and professions.

The rules related to the notion of incompatibility of the function of a Constitutional Court judge aim to guarantee the independence of the judge and his/her full engagement in the operation of the Constitutional Court.

Article 10 of the Rules of Procedure of the Constitutional Court regulates in more detail the issue of immunity, in accordance with the constitutional provisions. Constitutional Court judges enjoy immunity like the members of the Assembly of RNM, as determined by the Constitution.

The Constitution and the Rules of Procedure **do not provide for the possibility of recusal of judges**. Recusal of the judges of the Constitutional Court, both at the request of the parties in the procedure for protection of human rights and freedoms, and at the request of the judges themselves, by presenting arguments, should be regulated by the

Rules of Procedure of the Court. The decision for recusal may be made by the President of the Court or by the judges, upon his/her proposal. Exhausting the number of recused judges could be an issue, if a number of judges are recused from the procedure. This problem could be overcome through the election of *ad hoc* judges by the Assembly, in the same manner as in the regular procedure.

The material situation of the constitutional judges is an important condition for their independence, which is reflected in the full financial autonomy of the Constitutional Court. This issue is mainly regulated by law, and to some extent by secondary legislation, whereas the Constitution, in principle, only guarantees the material independence of judges.

The material situation of the judges of the Constitutional Court of RNM is primarily conditioned by their earnings.

Earnings consist of salary, salary supplements and salary allowances.

Salaries of constitutional court judges are governed with the **Law on Salaries and Other Remunerations of the Members of the Assembly of the Republic of Macedonia and Other Elected and Appointed Persons in the Republic** (Law on Salaries).

When we compare constitutional judges to judges in the regular judiciary, it follows that, according to the Law on Salaries of Judges (Article 7-b), judges in regular courts are entitled to salary supplements. According to the Law on Salaries, the judges of the Constitutional Court are not entitled to such supplements, but they should undoubtedly be entitled to receive them. The question, however, is how to regulate this matter.

The Constitutional Court amended the Rules of Procedure and in Article 10-a provided for salary supplements, which in our opinion is not under the jurisdiction of the Constitutional Court and such supplements should have been provided for under the above-mentioned Law on Salaries instead. The same applies to circumstances when it would be impossible to decrease judges salaries. With respect to the impossibility to decrease their salaries, Constitutional Court judges need to receive the same treatment as regular judges. In any case, it should not be a problem to include this matter in the Law on Salaries.

2

FUNCTION OF THE CONSTITUTIONAL COURT

Constitutional Court jurisdiction is concentrated to its actual jurisdiction i.e. its specific powers, explicitly stated in Article 110 of the Constitution of the RNM. It consists of the following five groups of matters: normative control over general legal acts, direct protection of constitutional rights and freedoms of the man and the citizen, resolving disputes over jurisdiction between state bodies and resolving disputes between state bodies and local self-government units, deciding on the responsibility of the President of the Republic, deciding on the constitutionality of the programs and charters of political parties and citizens' associations, and deciding on other matters/issues established by the Constitution.

2.1.

NORMATIVE CONTROL

Through the normative control, the Constitutional Court actually controls the constitutionality of the applicable law, i.e. it protects the superior effect of the Constitution in the legal order of RNM.

The Constitutional Court of RNM, in accordance with Article 110, line 2 of the Constitution, has the power to decide on the compliance of other regulations and collective agreements with the Constitution and the laws. Jurisdiction to do judicial review given to the Constitutional Court is a rare and perhaps unique example in comparative law. Most often, the jurisdiction to do legal review is in the hands of the regular courts. In the local practice, there is constitutional presumption when deciding on legality.

In RNM, the normative control of constitutionality and legality, in accordance with the established general standards of the constitutional trial, and incorporated in the Rules of Procedure of the Constitutional Court, is exercised according to two basic criteria: first, as "repressive" or a posteriori control, which means that the Constitutional Court may assess the constitutionality and/or legality only after a law, i.e. other regulation or general act has been adopted and entered into force.

Second, normative control is exercised either as an abstract (principaliter) or as a concrete (incidenter) control of constitutionality. In the first case, normative control is realized as an abstract dispute between norms of higher and lower rank, regardless of whether the challenged norm should be applied in a specific case, or whether it has ever been applied at all. In the second case, the specific control is a control of the constitutionality initiated by a court for the purpose of assessing a norm of law that it should apply in a specific case on which it deliberates, but considers that such norm is not in accordance with the Constitution, and it cannot apply it directly.

Abstract control of constitutionality and legality is dominant in the work of the Constitutional Court, and as petitions were submitted mainly by persons (natural and legal) who were affected by the application of the disputed norms, abstract control served as a means of achieving their specific legal interests. In addition, as part of the abstract control, the Constitutional Court made the most important doctrinal decisions for ensuring the fundamental values of the constitutional order, starting with protection of human rights, separation of powers, rule of law, free and democratic elections, to constitutionalizing of the European Convention on Human Rights (ECHR) and the acceptance of ECtHR judgments.

In 2006, the Constitutional Court decided to constitutionalize the Convention[1] in a manner more closely related to the status of human rights in the constitutional order. The Court relied on the fact that international human rights acts, from the point of view of essence, regulate exclusive constitutional matter, i.e. have constitutional content and that therefore it is legitimate to pose the question if those acts, especially the ECHR, should have a different status from the others in the constitutional order of the country?

The duty to treat international human rights treaties in the constitutional order of RNM in a different way, and not only through the prism of the formal hierarchy of legal regulations, is based on at least two reasons that refer to essential aspects. Firstly, human rights and freedoms recognized in international instruments are to a large extent incorporated in the provisions of the Constitution of RNM i.e. in over 1/3 of the Constitution; and, secondly, in accordance with Article 8 paragraph 1 line 1 of the Constitution, fundamental freedoms and rights of the man and the citizen recognized in international law and established by the Constitution, are a **fundamental value of the constitutional order of RNM**.

2.2.

PROTECTION OF RIGHTS AND FREEDOMS OF THE MAN AND THE CITIZEN

Direct constitutional protection of individual constitutional rights entered the constitutional order of the Republic through Article 110 line 3 of the 1991 Constitution, which explicitly gave the Constitutional Court the power to "protect the freedoms and rights of the man and the citizen relating to freedom of belief, conscience, thought and public expression of thought, political association and action and the prohibition of discrimination against citizens on grounds of sex, race, religion, nationality, social and political affiliation."

This provision adds on Article 50, paragraph 1 of the Constitution, in which it is provided that "every citizen may invoke the protection of the freedoms and rights established by the Constitution before the courts and before the Constitutional Court of the Republic of Macedonia, in a procedure based on the principles of priority and urgency."

Although it is clear enough that Article 110 line 3 and Article 50 paragraph 1 of the Constitution are an expression of the concept of direct protection of these freedoms and rights before the Constitutional Court, several elements in these constitutional provisions remain unclear on which the entire physiognomy of the process depends, as well as the very name of the instrument that has taken root in the contemporary culture of European constitutionalism, under the universal English name - constitutional complaint.

The Constitution does not regulate the name of the legal remedy, the acts against which it can be filed, who can file it and under what conditions, the deadline(s) for filing, what will be the effect of the decision of the Constitutional Court, etc. In order to ensure

1 The Constitutional Court Decision U.br.31/2006 dated 1 November 2006 abrogating a provision of the Law on Public Gatherings put the Convention at constitutional level.

effective access to the Constitutional Court and to exercise this constitutional competence, these issues had to be regulated by the act governing the manner of operation and the procedure before the Constitutional Court under Article 113 of the Constitution.

Our *constitutional complaint*[2], according to the provisions of the Rules of Procedure that govern it, has the following characteristics:

1. its title is "request for protection of rights and freedoms";
2. it is a legal remedy for protection before the Constitutional Court, when, according to the assessment of the person concerned, there is a current and direct violation of the freedoms and rights committed by individual acts or actions of public authorities, including the courts;
3. it is a legal remedy that protects only some basic human and citizen rights, enshrined in the Constitution;
4. it can be filed against both a final and a valid individual act, i.e. even before all legal remedies that can be filed against that act have been exhausted;
5. it can be submitted in a relatively short period of time following submission of a final or valid individual act, i.e. finding out about the taking of the action with which the violation was committed.

Considering the forgoing, and in addition to it, the decision of the Constitutional Court, when determining existence of a violation, has a nullifying or prohibiting effect on the individual act or action. The constitutional complaint thus proves to be, **from a normative point of view,** an extremely effective legal remedy, within its obviously limited scope. Indeed, its effects during the 31 years of experience in Macedonia are more than modest, and the statistics are extremely discouraging for people's hopes that they can protect their rights and freedoms before the Constitutional Court: until and including December 2020, the Constitutional Court pronounced a decision finding the violation referred to by the petitioners in 4 cases. The Constitution is restrictive with respect to the Constitutional Court's power to protect freedoms and rights, the quality of requests for protection, and the approach of the Constitutional Court judges towards the requests and the human rights substrate, as factors that, each in its own way, certainly affect this situation. Still, this does not affect the legal nature of the request for protection of freedoms and rights, i.e. the constitutional complaint. But, the normative restrictiveness of this remedy, as well as its real ineffectiveness, seem to contribute to certain ignoring of the true nature of the request for protection of human rights and freedoms and, in general, the constitutional complaint in RNM, which is not in line with the essential features thereof explained above. In any case, they contribute towards more frequent proposals to amend the Constitution in order to radically extend the jurisdiction of the Constitutional Court to include direct protection of other constitutional freedoms and rights.

This text does not attempt to support or challenge the possible and seemingly necessary constitutional reform of the jurisdiction of the Constitutional Court in the mentioned direction, but rather to do a value analysis of the system for protection of the constitutional freedoms and rights in RNM before the Constitutional Court. In addition to the constitutional complaint, this system also includes the *actio popularis*, i.e. the individual complaint (petition) that directly challenges the constitutionality of a law or other regulation.

2 The term 'constitutional complaint' is used in this analysis as a synonym of the 'request for protection of human rights and freedoms' so as to suggest that there is no difference with the meaning of this notion, only in the terminology used and that the name of the legal remedy is irrelevant in relation to its legal nature.

2.3.

THE PROCEDURE BEFORE THE CONSTITUTIONAL COURT

In accordance with Articles 11 and 12 of the Rules of Procedure, **the procedure for assessing the constitutionality of a law or the constitutionality and legality of a general secondary legislation act (judicial review procedure)** is initiated with a decision of the Constitutional Court on the of petition filed. Anyone can file a petition for judicial review of a law or a general secondary legislation act (*actio popularis*).

There is no provision restricting or determining who may file a judicial review petition, hence it may be concluded that, in addition to everyone else, the judges of the Constitutional Court may do so.

In addition, the Constitutional Court may (*ex officio*) initiate a judicial review procedure (assessing the constitutionality of a law or the constitutionality and legality of a secondary legislation general act).

Regarding the possibility for the Constitutional Court to initiate a procedure for assessing the constitutionality of a law and the constitutionality and legality of a general secondary legislation act, we draw attention to the provision of Article 16 paragraph 2 of the Rules of Procedure which states, *inter alia*, that when a petition is filed by an unknown petitioner, it shall be considered not to have been filed, which the Secretary shall note on the petition. This poses the following question: Why doesn't the Constitutional Court initiate a judicial review, if it may initiate the procedure *ex officio*?

After assessing constitutionality of laws and constitutionality and legality of the secondary legislation (judicial review), the next function of the Constitutional Court is to **protect human and citizen rights and freedoms.** The Constitution of RNM covers a small scope of freedoms and rights whose protection is placed under the jurisdiction of the Constitutional Court.

Article 110 line 3 of the Constitution is not in collision with the provision of Article 50, according to which every citizen may invoke the protection of freedoms and rights enshrined with the Constitution before the courts and before the Constitutional Court, in a procedure based on the principles of priority and urgency. Judicial protection of the legality of individual acts of the state administration and other institutions exercising public authority is guaranteed.

In fact, the Constitution maker provides for a dual system of protection of human rights and freedoms: before the regular courts and for certain rights before the Constitutional Court. It is unclear why this is so and why there is no possibility for all rights and freedoms provided as fundamental values in the Constitution to be assessed for protection before the Constitutional Court!?

It is not clear why the Constitution maker **distinguishes between 'citizen' and 'man'** when calling for protection, giving priority **only to the citizen in protecting** the freedoms and rights set out in the Constitution before the courts and the Constitutional Court, in accordance with Article 50 and Article 100 of the Constitution which protect the freedoms and rights of **the man and the citizen.**

According to Article 51 of the Rules of Procedure of the Constitutional Court, any citizen who considers that an individual act or action violates any right or freedom defined in Article 110, line 3 of the Constitution of RNM may request protection before the Constitutional Court.

Pursuant to this provision of the Rules of Procedure, **only a natural person who is a citizen of the Republic of North Macedonia** may lodge a request for protection of rights and freedoms. Where a legal entity is the party submitting the request, the Court is obliged to refuse it. The restriction imposed by the Rules of Procedure originates in the provision of Article 110 line 3 of the Constitution of the RNM, which stipulates that the Constitutional Court protects only the freedoms and rights of the man and the citizen.

It is not known why only natural persons, and not legal persons, have been provided with the protection of rights and freedoms. Amendment is certainly needed to this effect, both to the Constitution and the Rules of Procedure.

Article 51 of the Rules of Procedure narrows the broadly established constitutional provision on the possibility to request protection of human rights and freedoms under Article 110, line 3 only to the citizen, not to the person.

What about the term "MAN"? This term means a person who is not a citizen of RNM (Article 4 of the Constitution), meaning that the person is a foreigner. May such person file a petition for judicial review of a law or a general secondary legislation act? The answer is yes. May such person lodge a request for protection of human rights and freedoms? The answer is again yes.

In accordance with the Rules of Procedure, when deciding on the protection of human rights and freedoms the Constitutional Court, as a rule, decides in a public hearing (Article 55).

According to the information obtained from the check of the decisions of the Constitutional Court, in most of the procedures on lodged requests for protection of freedoms and rights, no public hearing was held. This is contrary to Article 55 of the Rules of Procedure.

Not holding public hearings on lodged requests, in accordance with the Rules of Procedure, and leaving the assessment to the Court so that it would select the cases for which a public hearing will be held, demonstrates insufficient openness of the Court toward the general public and lack of will to engage the expert public in order to make the correct decision and gain public support (trust) for the work of the Court.

The analysis of the procedure for protection of the rights and freedoms of the man and the citizen posed the following question: Where a violation committed by an individual act or action is caused by an unconstitutional law or a provision thereof, may the Constitutional Court make void or abrogate the unconstitutional law or the provision thereof that caused the violation under the same procedure in which it decides on the protection of rights and freedoms? The Constitution and the Rules of Procedure do not contain provisions that impose restrictions on the Court to conduct the two procedures separately. Hence, we do not see any impediment faced by the Constitutional Court to merge the two procedures into one, as this would positively influence the quality of the procedure. At the same time, it would allow to apply the ECtHR practice - to do a judicial review of the quality of the law and its compliance with the Constitution. This thesis finds support in the provision of Article 14 of the Rules of Procedure, according to which the Constitutional Court may itself (*ex officio*) initiate a judicial review of a law or a regulation or other general act.

2.4.

ENFORCEMENT OF CONSTITUTIONAL COURT DECISIONS

With respect to enforcement, the decisions of the Constitutional Court have several essential features. They are final and enforceable. In addition, they are mandatory. Every person to whom a Constitutional Court decision refers is obliged to enforce it.

According to Article 86 of the Rules of Procedure, the decisions of the Court are enforced by the maker of the law, the regulation or the general act that is made void or abrogated with the decision of the Court.

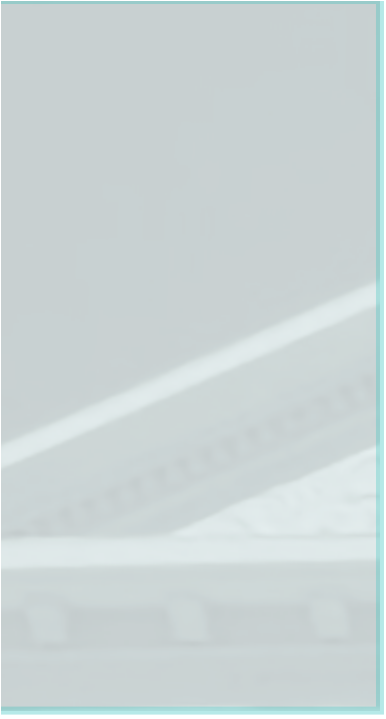
Decisions whereby the Court decides on protection of freedoms and rights established by the Constitution are enforced by the body that adopted the individual act that was made void by the decision, i.e. the body that took the action that the Court found to violate such right(s) or freedom(s). This obligation strengthens the independence of the Court and the judges.

The Constitutional Court has an obligation to monitor the enforcement of its decisions and, if necessary, request from the Government of RNM to ensure their enforcement.

There is no doubt that the Government can ensure efficiency in the enforcement of the Court's decisions, simply by following the text of the decisions. Therefore, Constitutional Court decisions need to be reasoned thoroughly and in detail. This will allow to perceive the manner of their enforceament.

At the working meetings with the representatives of the Court, the issue of formalism in processing the enforcement of the decisions was pointed out. Namely, pointed out was the practice when the organ obliged to enforce the decision would adopt a new general act, i.e. would correct a provision of the act with insignificant amendments or revisions, amending one or several words that, in essence, do not eliminate the violation of the Constitution, i.e. the law, following which a new petition for judicial review of the general act could or would follow. Thus, the decision of the Constitutional Court is 'evaded', which, from a legal point of view, is not allowed. In addition, such behavior unnecessarily increases the number of cases before the Court.

It should be noted here that a strong instrument for enforcing the decisions of the Constitutional Court are the provisions of the Criminal Code which prescribe high sentences (five or ten years of imprisonment) for non-enforcement of a decision of the Court. Unfortunately, it hasn't come to our attention if cases for criminal liability have been initiated and what were their outcomes, but it is certain that in conditions of consistent application of the laws such a procedure could have a strong warning effect. At the same time, it should be noted that criminal liability may not be invoked for a decision of the members of Parliament, where the opinion has been presented and voted. Members of Parliament are protected by the parliamentary immunity provided for in Article 64 of the Constitution. Conduct leading to failure to decide to amend an unconstitutional law may be sanctioned in other ways, especially in the election process.



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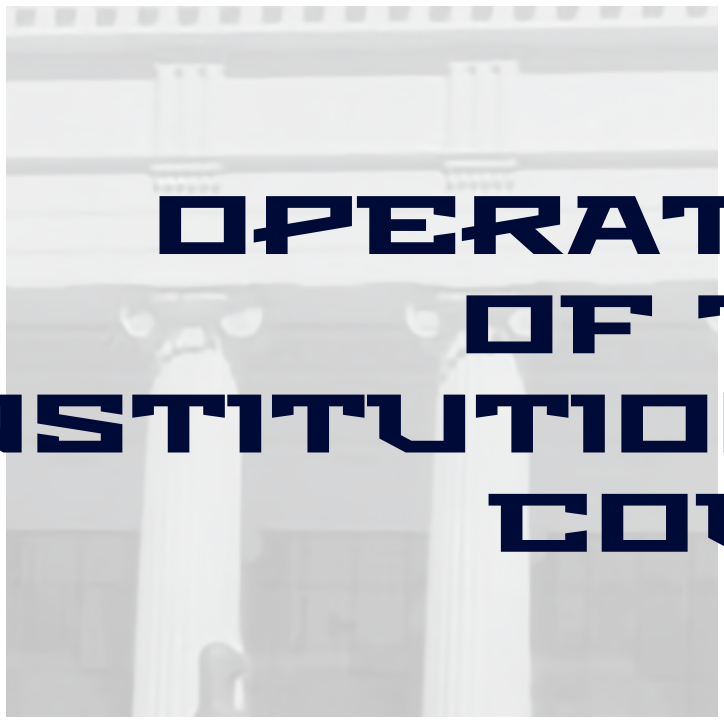


OPERATION OF THE CONSTITUTIONAL COURT



The Institute for Human Rights monitored the work of the Constitutional Court under the "Constitutional Court - Guarantor of the Rule of Law" project, in the period October 2020 to July 2021.

The collected information provided us with the following insight: During the reporting period, the Court processed 172 cases. This number of cases does not indicate that the Court is overloaded with work. Namely, in the said period, each judge -rapporteur processed approximately 22 cases, i.e. 2 cases per month on average, which is certainly not an indication of work overload.

Average duration of procedures (from filing of the petition, request, proposal to completion of the procedure) in cases for which final acts were adopted by the Constitutional Court in the reporting period, calculated from the day of submission (irrespective of the beginning of this project), is 9 months for the first and the second quarter and 11 months for the third quarter.

Still, when analyzing the individual cases with respect to duration only (without indulging in the content of the cases), it can be noted that the longest procedure lasted as long as 98 months, whereas the shortest period in which a case was decided was 1 month. The prolonged duration of certain procedures is an indicator of insufficient efficiency in the work of the Court, when deliberating on the cases.

During the reporting period, the Constitutional Court held a preparatory session in 6 cases. The practice of holding preparatory sessions has been established during the last year and represents a positive change in the work of the Court.

Regardless of the increased number of preparatory sessions when deciding on petitions, the Court held only one public hearing (one public hearing has been scheduled) on a request for protection of rights and freedoms, even though when deciding on protection of rights and freedoms it should do so in a public hearing.

In the last quarter of the monitoring activity, it was established that the Court did not reach a decision in 4 cases because the decision proposals did not receive the necessary majority. We locate the reason for this in the fact that the term of office of three constitutional judges ended on 31 May. Since that date the Court has been operating with 6 judges - not in full composition; making a decision requires majority of votes of the total number of judges i.e. minimum of 5 votes. As new judges have not been elected after the term of office of the three judges has ended, and more than 3 months have passed, we consider the situation to be unacceptable. It adversely affects the efficiency of the work of the Court and causes backlog of cases. Additionally, it suggests that there is an issue with the election procedure for constitutional judges, as it is not regulated in detail.

In practice, monitoring of the enforcement of Constitutional Court decisions is conducted as follows: every person having a legal interest in the enforcement of a certain Constitutional Court decision submits a writ informing the Court that its decision has not been enforced. If the writ is in order, a case is formed marked with "I", following which the Secretary of the Court requests a due notification from the owner of the act or another entity about the enforcement of the decision. If the Court does not receive notification about the enforcement of the decision, the Secretary of the Court, in accordance with Article 87 of the Rules of Procedure of the Court, asks the Government of the RNM to ensure the enforcement.

During the monitoring of the work of the constitutional judges, it was determined that alphabetical order is applied to distribute cases (petitions) among the judges, according to the surnames of the judges. We could not determine whether the complexity of the cases played any role in the distribution even though there are provisions in the Rules of Procedure for the allocation of cases. However, these provisions are not sufficiently clear and precise.

Based on the monitoring of the transparency of the Court, the following can be determined: A total of 148 announcements about the work of the Constitutional Court have been published of the Constitutional Court website. Due to the situation with the pandemic in RNM, the Constitutional Court did not hold any conferences for the media, but maintained constant communication with the media and informed them of the Constitutional Court daily operation. The Court's website is well designed and regularly updated. When analyzing it, it is important to emphasize that the search function is fully functional and allows easy search and finding the necessary information. Still, it is evident that the Court can provide less information. In addition, the Court is open to cooperation with citizens' associations.

As can be seen from the foregoing, the Constitutional Court is a transparent institution in general. However, with respect to proactive transparency, i.e. publishing information of public character that is in the interest of the public, we found that the range of information that can be obtained at the website is restricted.

4

CONCLUSSION

Contemporary constitutional science and caselaw flags the need to strengthen the independence of the constitutional courts, especially as they ensure exercising constitutionality in a given country and protection and exercise of basic human rights and freedoms.

Following ECtHR practice, the Constitutional Court, by exercising its jurisdiction, adopted the acts governing its operation, thus strengthening its independence.

Constitution makers provided that the Constitutional Court adopt an act regulating its operation. The constitutional judges called this act Rules of Procedure of the Constitutional Court of RNM.

The Constitution of RNM provides for jurisdiction of the regular courts and the Constitutional Court in the protection of human rights and freedoms. Namely, for the regular courts this is done through the procedural and substantive laws, whereas for the Constitutional Court through certain rights and freedoms only, as provided in Article 110, line 3 of the Constitution, including protection against discrimination on precisely defined grounds. The new Law on Prevention and Protection against Discrimination provides more grounds for discrimination compared to the Constitution. This requires constitutional amendments so as to expand the list of grounds for action by the Constitutional Court.

Moreover, there is a need for a broad expert debate on whether the list of rights and freedoms, whose protection is exercised before the Constitutional Court, should be expanded, as well as whether the direct application of the ECHR and the existing legal mechanisms in the national legal system fail to provide sufficient and quality protection of human rights and freedoms?

The Constitutional Court cannot take on the role of a fourth instance.

Given that there is no opportunity for a legal entity to seek protection of the rights provided for with the Constitution, a correction is needed to remedy this. It would be most appropriate to replace the words "man" and "citizen" with the word "everyone", like in the text of the ECHR. Otherwise, the complete application of the ECHR would be questionable. The second possibility is to amend the Constitution and add the term "legal entity". This amendment would be made at the same time to the Rules of Procedure as well.

The Constitutional Court confers a constitutive character to the ECHR with the Constitutional Court Decision U.br.31/2006 dated 1 November 2006, adopted upon filing a petition for judicial review. The question is whether, by applying ECHR in practice, it can be deemed to extend its relevance to the protection of rights and freedoms? Partial assessment of the constitutional effect of the ECHR raises serious dilemmas. It is necessary to harmonize the understanding of the importance and the implementation of the ECHR.

The Constitution and the Rules of Procedure do not provide for the possibility of recusal of judges. Recusal of Constitutional Court judges is part of the manner in which the Constitutional Court operates. Therefore, recusal both upon request of the parties in the procedure for protection of human rights and freedoms and upon request of the judges themselves, with presentation of arguments, should be regulated with the Constitutional Court Rules of Procedure. The decision for the recusal may be made by the President of the Court or by the judges, upon his/her proposal. Additionally, the problem of filling the sits of recused judges could be overcome through the election of *ad hoc* judges by the Assembly, in the same way as in a regular procedure.

The status of judges i.e. their independence is a constitutional category. Judges' salaries are regulated by law and the same should apply to other salary supplements that are now regulated with the Rules of Procedure. It is true that this manner strengthens the independence of judges, but given the legal nature of these rights, they should be regulated with the applicable laws, and not with the Rules of Procedure.

Pursuant to the Rules of Procedure, distribution of cases (petitions) is done according to alphabetical order, of the surnames of the judges. Provisions governing this matter are not sufficiently clear and precise. Distribution of cases, as one of the basis of enhanced independence, should be clearly and precisely elaborated in the Rules of Procedure, in order to avoid any possible abuses. Hence, the complexity and the type of cases should be taken into consideration.

The Constitutional Court monitors the enforcement of its decisions only when a party with a legal interest in the enforcement of a certain decision submits a writ informing the Court that its decision has not been enforced.

Concerning non-enforcement of decisions, the Constitutional Court should have a proactive role in informing the public about the situation with the enforcement of the decisions. Thus, the general public would be familiar with the situation of non-enforcement of Constitutional Court decisions by a particular organ and would be able to assess the possibly inappropriate behavior.

The constitutionality of the law that interfered with a certain right or freedom should be assessed in the same procedure in which the alleged violation of that right or freedom is being determined. The Rules of Procedure need to be revised so as to merge the two procedures into one.

The situation with failing to elect new judges following termination of the term of office of three constitutional judges on 31 May adversely affects the efficiency of the work of the Court and causes the number of cases to increase.

It is necessary to immediately elect the judges of the Constitutional Court in order to fill the vacant sits and fulfill the constitutional requirement concerning the number of constitutional judges. This is necessary so as to ensure effective and efficient operation of the Constitutional Court.

Following the work of the Constitutional Court, it became evident that it is important to emphasize the more frequent preparatory sessions of the Constitutional Court, when deciding on filed judicial review petitions. On the other hand, the Court held only one public hearing on requests for protection of rights and freedoms, although as a rule the Court should decide on these requests at a public hearing. Failure to hold a public hearing should be an exception, not a practice as is now, and there must be a good reason for the Court to do so and an obligation to explain why it will not hold a public hearing.

With respect to the duration of the procedures from filing of petitions, requests and proposals until completion of the cases, it took 11 months in average in the last quarter, which is a longer processing period. However, when giving a relevant assessment of the duration of the procedure, it is necessary to make a substantive analysis of the cases, taking into account several indicators such as the complexity of the procedure, the type of case and other factors that may influence the decision.

With respect to proactive transparency, i.e. publishing information of public character that is in the interest of the general public, we found that the range of information that can be obtained at the Constitutional Court website is limited. In this context, we would recommend that the Constitutional Court, in order to increase its transparency and accountability, consider expanding the range of information available to the citizens.