

The Development of the Constitutional Judiciary in the Republic of North Macedonia

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Abstract

In the legal - constitutional theory there is no doubt that constitutionality and legality presents the basic principles on which the political and legal system of a country (state) is fulfilled. This, in other words, means that the principles and rules laid down by the highest legal - constitutional act and legal act of a country, in practice should be respected and implemented. The Constitutional Court of the Republic of North Macedonia presents very important constitutional institution, with a special constitutional position that the constitution determines it directly, which along the position defines also its competences. In the work of the Constitutional Court, the Republican Assembly or other state body, don't have the right to influence, because the Constitutional Court exercises its activities independently without the influence of any state or other non-state organ. The effectiveness of judicial - constitutional protection depends on the standard and providing the necessary conditions for an efficient and professional judiciary. Only by raising the standard and creating better conditions will be created conditions for the real realization of the rights guaranteed by the constitution. In that way are going to be created the conditions for the constitutionality and judicial - constitutional protection.

Keywords: Constitutional court, professional judiciary, institutions, rule of law, dispute

DOI: 10.7176/JLPG/130-06

Publication date: March 31st 2023

1. Introduction

In the Republic of North Macedonia, the constitutional judiciary has existed for a relatively long time, since 1963, when it was first provided by the Constitution of the Socialist Republic of Macedonia, as a special institution for the control of the constitutionality of laws. Then, almost in the same form, this institution is foreseen in the Constitution of the Socialist Republic of Macedonia of 1974. And in the end, with a few changes and a narrower constitutional arrangement, this institution is envisioned in the Constitution of the Republic of Macedonia, from 1991.

As a result of this development, it is worth noting that the Republic of North Macedonia has several decades of experience in the development of the constitutional judiciary, following the Kelsenian/European model, both in the theoretical and practical sense, implemented for the first time with The Austrian Constitution of 1920. This lifespan of several decades of the constitutional judiciary represents an important tradition of its development, which continues to develop even today, established with its independence from the Yugoslav federation in 1991. This tradition has a very positive effect on the authority of the Constitutional Court, on the realization of the principle of the rule of law, in the complex circumstances of the transition of society from socialism to "democracy-capitalism".

The more than 30 years of the 1991 Constitution are enough to see if it has passed the test of time, the need for the construction of a concept that would reduce animosity between political opponents, the failure to create a legal culture that takes on disturbing proportions, the increase in the politicization of society, the atrophy of institutions, the personification of institutions and all other divisions such as political, ethnic, linguistic and religious. A concept which will initially reduce divisions and differences, and later lead them to a patient stage, of a legal framework of confrontation, because it is impossible for them to disappear completely. The constitution, laws and institutions should be the guarantee of the constitutional order and the rule of law, not the people. The reality of permanent political crises, which have their source in the low level of political culture, necessarily led to permanent crises of the legal state and the rule of law.

The constitutional framework that regulates the position, composition and powers of the Constitutional Court is foreseen by only six articles of the Constitution (articles 108-113) from the entry into force of the Constitution of the Republic of North Macedonia in 1991.

2. Constitutional-judicial position of the Constitutional Court of the Republic of North Macedonia

The Constitution of the Republic of North Macedonia states that "The Constitutional Court of the Republic of North Macedonia is a body of the Republic which protects constitutionality and legality". The Constitutional Court is presented as a very important constitutional institution, with a special constitutional position, which is directly defined by the constitution, which defines its powers in addition to the position. Treating it as a constitutional category, it is defined only by the constitution, i.e. not even by law or bylaw. The only issue that is

not regulated by the constitution or by law is the issue of the way of work and its procedures. The regulation of the matter provided by the internal act of the court cannot exceed the constitutional framework of the position it has. Allowing some matters to be regulated independently by the Constitutional Court with its own act strengthens its position in the system of separation of powers, especially vis-à-vis the legislative power. There are even other views that this regulation of the work of the Constitutional Court of the Republic of North Macedonia has the possibility of making it very comfortable in the course of constitutional justice. Given that this Regulation of the Constitutional Court was issued in 1992, very soon after the Republic of North Macedonia emerged from a socialist system and mentality and, considering the constitutional changes that occur as a result of the Ohrid Framework Agreement of 2001, I think that it is time to adopt a law on the work of the Constitutional Court, which would have to incorporate all the constitutional changes. The Venice Commission in its Opinion in relation to the six proposed constitutional amendments states that: In most European countries, the constitutional provisions for constitutional courts are further developed in separate laws or constitutional laws. However, in the Republic, there is no special law for the Constitutional Court. Article 113 of the Constitution stipulates that "the way of working and the procedures before the Constitutional Court are regulated by an act of the Court". The only legal act that regulates the work of the Court is the Work Regulation of 1992. The Venice Commission sees this situation as quite irregular. According to the Commission's opinion, it would be useful to adopt a special law for the Constitutional Court that would regulate issues related to the status of its judges, the basic conditions for the initiation of proceedings before the court, the legal effects of decisions, etc.

The independence of the Constitutional Court is seen in the fact that it exercises its function only on the basis of the constitution. So, neither the Republican Assembly nor any other state body has the right to influence the work of the Constitutional Court, because the Constitutional Court exercises its activity independently without the influence of any other state or non-state body.

Institutionally, the Constitutional Court, in an exceptional sense, is included in the sphere of judicial power, but with a duality in its role and position. It is not a classic judicial institution, despite the existence of some elements of the classic judiciary. The constitutional court also has a broader political dimension, but nevertheless it is not and does not present itself as a political body or institution in its true sense. Given its specific character, the Constitutional Court is presented as a special constitutional-judicial court and as a political institution. The dualist character is not only a quality of the Constitutional Court of the Republic of North Macedonia, but also of the constitutional courts of other countries.

The constitutional court, first of all, is a body of jurisprudence, based on the very name defined by the constitution. As a court, its basic function is to protect the constitutionality and legality of the system. The protective character of this function is a prominent classic judicial element, which really gives the court the character and position of a special judicial institution in the system. The protective function, which it performs through the development of the constitutional-legal dispute, in a certain preliminary procedure and with the conduct of its own decision, are also elements of its judicial nature and character. The Constitutional Court does not create the right and does not determine what is the right, but determines what is not the right. It does not write original norms, but examines them, evaluates them and decides conclusively that the relevant norms and certain relations are in compliance with the Constitution, international agreements ratified by law, respectively with the laws.

As for its character as a political body or institution, it must also bear responsibility for the political relationships, conditions and circumstances under which court decisions are made. Due to these reasons but also the issues that fall under its competence, it also, to the same degree, represents a political body, respectively a sui generis political institution.

The Constitutional Court must essentially protect the objective legal order of the state. From the position it has in the Constitution of the Republic of North Macedonia, it does not mean that it must protect only the constitution, but must also preserve the constitutionality and legality of the system. In this case, the dilemma arises as to how much this protection of constitutionality and legality should be started only from the aspect of the written constitution or from all that emerges from the understanding of constitutional law in a state. From the dilemma posed that the constitutional court is only the custodian of the constitution, which is usually meant as a classic position, or that it is the custodian of the objective legal order in the state, we will explain its broader interpretation. Its basic function is to maintain constitutionality and legality in the entirety of the constitutional and legal order of the Republic of North Macedonia. The constitution does not limit its object of protection to certain acts or actions, or only to certain subjects. On the contrary, it considers the entirety of the constitutional system and order of the Republic of North Macedonia, but from the aspect of protecting constitutionality and legality.

3. Composition and election of the Constitutional Court of the Republic of Macedonia

The Constitutional Court of the Republic of Macedonia consists of nine judges who are elected by the Assembly of the Republic of North Macedonia. The Republican Assembly, with a majority of votes from the total number

of deputies, elects only six judges, while for the election of the other three judges, it is required the vote of the majority of the deputies, who declare that they belong to the ethnic community, which does not constitute the majority of the population in the Republic of North Macedonia. This method of electing the judges of the Constitutional Court is foreseen by the XV Constitutional Amendment, which came out as a result of the constitutional changes foreseen by the Ohrid Framework Agreement.

With the constitutional changes of 2005, there are also innovations regarding the election of judges of the Constitutional Court. Here we are dealing with those candidates who are proposed by the Republican Judicial Council. In accordance with these amendments and supplementation, the Republican Judicial Council proposes two judges to the Constitutional Court. The proposal is made exclusively by judges from ordinary courts. So, it is necessary that at the time of their proposal they were current judges in one of the judicial instances in the Republic of North Macedonia.

However, based on Article 424 of the Constitution of the SRM of 1974, it consisted of its president and six other judges who were elected for a term of eight years, without the right of re-election.

The right to propose candidates for judges of the Constitutional Court, according to the Constitution of the Republic of Macedonia of 1991, is divided between several bodies such as:

- The President of the Republic - who proposes two candidates;
- The Republican Judicial Council - also proposes two candidates - from the ranks of current judges in regular judicial instances and
- The Assembly Committee for Mandates and Appointments - proposes five other candidates.

Constitutional judges are elected from the list of affirmed jurists, with a mandate of nine years "without the right of re-election" (Article 109, paragraph 2 of the constitution). This solution offered by the constitution may contradict a reality that is necessary for the existence of unity in its work.

The Constitutional Court, in its session, elects the President of the Constitutional Court from among its judges with 2/3 of the votes from the total number of judges, by secret ballot, with a duration of three years without the right to re-election.

The Constitution defines as incompatible the issue of being constitutional judges and exercising other public functions. According to Article 111 al. 2 of the Constitution of the Republic of North Macedonia of 1991, "the function of being constitutional judges is incompatible with the exercise of other public functions and professions or with joining a political party."

4. Powers of the Constitutional Court of the Republic of North Macedonia

The powers of the Constitutional Court of the Republic of North Macedonia are determined by Article 110 of the Constitution of the Republic of Macedonia. According to this article, the Constitutional Court of the Republic of North Macedonia:

- Decides on the compatibility of laws with the Constitution;
- Decides on the compatibility of other provisions and collective contracts with the Constitution and laws; Protects the freedoms and rights of the human and citizen related to freedom of belief, conscience, opinion and free expression of opinion, association and activity with political goals and prohibition of discrimination of citizens based on gender, race, religion, national, social and political affiliation;
- Decides on the conflict of competence between the legislative, executive and judicial powers;
- Decides on the responsibility of the President of the Republic;
- Decides on the constitutionality of programs and statutes of political parties and civic organizations;
- It also decides on other issues defined by the Constitution.

Based on the powers presented above that the Constitutional Court of the Republic of North Macedonia, as a body that protects constitutionality and legality, it has several functions:

a. Normative control of general legal acts (control of constitutionality and legality). Within this competence, the Constitutional Court decides on:

1) Compliance of laws with the constitution, as the highest legal act (Art. 110 paragraph 1 point 1 of the Constitution of the Republic of North Macedonia).

2) Compliance of other legal provisions and collective contracts with the constitution and laws.

This competence of the Constitutional Court constitutes the essence of its work.

b. Protection of freedoms and certain rights of human and citizen guaranteed by the constitution – According to Article 110 paragraph 3 of the Constitution of the Republic of North Macedonia, the Constitutional Court carries out the protection of freedoms and rights related to:

1) freedom of religion (belief), opinion and free expression of opinion;

2) the freedom and right of associations and the development of political activity and

3) prohibition of discrimination of citizens on religious, gender, national, social and political grounds.

So, from what was said above, it is clearly seen that the Constitutional Court protects only some political and civil rights for which it is thought necessary to have constitutional protection. That is, both

constitutional protection and judicial protection are provided for the same.

c. Decide on the conflict of jurisdiction:

According to Article 110 paragraph 1 point 4 of the Constitution of the Republic of North Macedonia, the Constitutional Court decides:

1) decides on the conflict of competence between the holders of legislative, executive and judicial power and

2) conflict for competence between state bodies and local self-administration units.

As for the conflict of competence itself, it can be:

Positive conflict for competence, - when two or more bodies (legislative, executive and judicial) of the central government or local government bodies, take the same powers and,

Negative conflict for competence, - when the aforementioned bodies reject the competence as their own.

In the work of the Constitutional Court so far, it has been decided about the conflict for positive competence. This positive conflict is presented between the constitutional command powers of the President of the Republic and the Ministry of Defense of the Republic, based on the Defense Law announced in the "Official Gazette of the Republic of Macedonia", no. 8/92. The Constitutional Court of the Republic of Macedonia with decision no. 123/1993-0-0 dated 14.10.1994 resolves this conflict in favour of the competences of the President of the Republic, "Article 17. point 9 of the Law on Defense is annulled (Official Gazette of the Republic of Moldova no. 8/92). According to article 79, paragraph 2 of the Constitution of Macedonia, "the supreme commander of the armed forces in the Republic of Macedonia is the President of the Republic, who performs his rights and obligations in accordance with the Constitution and laws".

Conflicts for positive competence in the Republic of North Macedonia are quite frequent, especially in recent times between the power of state bodies and local government bodies, in the period when the decentralization process is taking place in North Macedonia, with the aim of realizing local self-government as a necessity time. However, it does not mean that for those relevant bodies, it raises an initiative in the Constitutional Court. The causes can be of different natures, first of all of politics, or even insufficient approval of laws that would regulate these reports. On the basis of the "Review" of the work of the Constitutional Court of the Republic of North Macedonia for the year 1994-2003, it has decided on 3 cases related to the conflict of competences.

d. The competence related to the responsibility of the President of the Republic.

According to article 110, paragraph 1 point 6 of the Constitution of the Republic of North Macedonia, the Constitutional Court decides on the responsibility of the President of the Republic. It also decides on the removal of the immunity of the President of the Republic. And decides according to the official duty to present the reasons for the termination of the function of the President of the Republic.

The procedure for determining the president's responsibility is initiated by the Assembly with 2/3 of the votes from the total number of deputies. However, the responsibility of the president is decided by the Constitutional Court with 2/3 of the votes from the total number of judges. If the Constitutional Court determines the responsibility of the President of the Republic, then his function ceases according to the power of the Constitution.

It should be noted that until today the Constitutional Court of the Republic of Macedonia has not developed such a procedure to ascertain the responsibility of the President of the Republic.

e. Competence for the evaluation of programs and statutes of political parties

According to article 110, paragraph 1 point 7 of the Constitution of the Republic of North Macedonia, the Constitutional Court decides on the constitutionality of the programs and statutes of political parties of civil society.

This competence of the Constitutional Court is provided for the first time by the Constitution of then Republic of Macedonia of 1991. The Constitutional Court of the Republic of North Macedonia is competent for deciding disputes between the program and statute of the relevant political party on the one hand, and the Constitution of Macedonia on the other. As a result, it is exclusively a normative dispute, because the dispute takes place between two acts; the constitutive act of the political party and the Constitution of the Republic of North Macedonia. Such a dispute takes place when the program and statute of the political party or other organization is oriented towards the violent destruction of the constitutional order of the Republic of North Macedonia, or when national, religious, racial intolerance, etc. is encouraged.

Article 20 of the 1991 Constitution "guarantees the freedom of association in order to realize and protect political, economic, social, cultural, etc., rights". In this sense, citizens can freely form organizations and political parties, join them and leave them freely. According to point 3 of the same article, the programs and activities of civic organizations and political parties cannot be aimed at violently changing the constitutional regulation of the Republic of North Macedonia, inciting or calling military aggression, causing national hatred, religious and racial. The wording that the Constitutional Court evaluates the "constitutionality" of the programs and statutes of organizations and political parties is its much broader competence and does not correspond to its competence to decide on the compatibility of the programs and statutes of political organizations and parties

exclusively in the sense formal-legal, such as the compatibility of laws and other acts with the Constitution. But it also makes a material-legal assessment of their activity, undertakings and other political issues important for the realization of this competence. In its work, the Constitutional Court has also evaluated several programs of political parties and civic associations, and when its unconstitutional activity is found, they delete it from the Judicial Register. Such a thing, the court confirmed with Decision No. 168/2000-0-1 dated 17.01.2001. According to point 1 of the decision, the procedure for evaluating the constitutionality of a) The work program of the Civic Association "Ratko" with headquarters in Ohrid, adopted in the founding Assembly, in the meeting held on May 24, 2000 and b) Of the statute of the same association... and according to point 2, the initiative for the evaluation of the decision of the Basic Court of Ohrid (registration no. 18/2000 dated June 19, 2000) with which the registration of the civic association "Ratko" - Ohrid was made, is rejected in the register of associations and foundations ...

There are authors who think that in the 1991 Constitution "there are legal loopholes for the prohibition of the activity of political parties if they in practice act contrary to the constitutive acts and their programs." Such solutions are given by the Constitution of Albania, Slovenia, etc. But, such a dilemma in its work, the Constitutional Court has rejected that we are dealing with a legal vacuum, assessing the constitutionality of these programs and statutes as a whole, respectively that both aspects of constitutionality should be taken into consideration, such as those formal - legal and material - legal. Although there is a decision of the Constitutional Court of North Macedonia to cancel such program and statute of the political party, it actually has the effect of prohibiting the activity of the political party, because the Court of Appeal, as a regular court, based on the decision brought by the Constitutional Court, will bring a verdict for banning the existence of that party.

5. Legal effects of the decisions of the Constitutional Court of the Republic of North Macedonia

An important issue that must be addressed is the legal effects of the decisions of the Constitutional Court. The legal effects of the decisions of the Constitutional Court rely on several factors, depending on what procedure it develops, the type of decision that is taken, etc. Based on the nature of the decisions of the Constitutional Court, in most constitutional systems, they are final, binding and enforceable. The legal effects of the decisions of the Constitutional Court of the Republic of North Macedonia are determined by the Constitution and the Regulation of the Constitutional Court of 1992. According to Article 112, paragraph 3 of the Constitution, "the decisions of the Constitutional Court are final and enforceable." They are final in character, in the sense that for the same dispute, respectively for the same issue, a dispute cannot be developed again before the Constitutional Court, that is to say, the decisions of the constitutional court recognize the character of the thing judged (*res judicata*), and on the other hand, their final character is also related to the impossibility of using legal remedies to strike it down, be they regular or extraordinary legal remedies. This is the principle of the work of the Constitutional Court of North Macedonia and it has to do with those decisions with which it was decided on the constitutionality of the law or other general provision. A new constitutional dispute in this case can be developed only if there are other reasons for it. When the court has made an annulment decision, in the procedure of reviewing the constitutionality of the relevant law, then the effects of the decision will extend from the moment when such a general act began to produce legal effects, meanwhile, if the decision of the constitutional court has the character of repealing the general legal act, then the effects of such a decision are also different. Such a decision only abrogates the law so that it does not produce legal effects in the future. The decisions of the Constitutional Court of North Macedonia have a binding character based on the power of the Constitution itself (Article 112, paragraph 3 of the Constitution). According to Article 79 of the Rules of Procedure of the Constitutional Court of the Republic of North Macedonia, "the decision of the Constitutional Court of the Republic of Moldova which abrogates or annuls a law or any other general act produces legal effects from the day of its publication in the "Official Gazette of RNM".

Regarding the subjects, who are obliged to respect the decisions of the Constitutional Court, it should be noted that they are recognized as *erga omnes*, i.e. that they act towards all subjects, be they state bodies or other subjects.

From the theoretical and practical examinations of the legal effects of the decisions of the Constitutional Court of the Republic of North Macedonia, the following characteristics can be extracted:

- first, the act or provision of the abrogated or annulled normative act, can no longer, in the future, be applied as a legal source for the creation of concrete legal relations;
- second, the obligation of the legislator or other entity that issued the act, namely the abrogated or annulled provision, to issue another normative act, because in this case a "legal vacuum" has been created;
- third, the obligation of all competent subjects for the implementation of individual all-powerful legal acts approved on the basis of the abrogated or annulled law or act to prevent the creation of further consequences based on the abrogated or annulled legal source; and
- fourth, the creation of the possibility to cancel or declare null and void individual legal acts (final form) issued by the relevant bodies based on the law or the provision that in the meantime has been annulled by a

cassatory decision of the Constitutional Court.

6. The procedure for the protection of human and citizen freedoms and rights by the Constitutional Court of the Republic of Macedonia

Among the most important procedures carried out by the Constitutional Court of the Republic of North Macedonia is the protection of human and citizen freedoms and rights. We will mostly stay on this procedure for the reason that through this procedure the freedoms and rights of human and citizen are protected, as one of the basic values that the Constitution of the Republic of North Macedonia proclaims and protects, due to the fact that the protection of these freedoms and rights in the RNM is for the first time with the Constitution of 1991, because shorter development and completion deadlines are foreseen for this procedure and because of the interest that appears in their protection both from the side of various internal organizations and from the international community in general as well as from various organizations and individuals and because the violation of these rights is an obstacle to Euro-Atlantic integration for the countries aiming for that integration, meaning for Macedonia as well.

The protection of human and citizen freedoms and rights in the RNM is done by the regular courts. However, based on article 110, paragraph 3 of the Constitution of the RNM, The Constitutional Court "protects the freedoms and rights of human and citizen that are related to freedom of belief, freedom of thinking and free expression of opinion, freedom of political association and the prohibition of discrimination of citizens on the basis of gender, race, religion, national, social and political affiliation" . So, for some human and citizen rights and freedoms, in addition to their protection by the regular courts, we also have the protection by the Constitutional Court.

Citizens can request the protection of these freedoms and rights by the Constitutional Court in two ways:

1. Indirectly, - by taking the initiative to evaluate the constitutionality of any general legal act, or of collective contracts or any other act, if they think that based on those acts, any of their rights have been violated.
2. Directly, - by demanding protection of certain freedoms and rights, if they think that those rights and freedoms have been violated.

In the first way, citizens can protect their freedoms and rights provided by the Constitution, regardless of whether the legal provision or other legal act has produced legal effects or not, i.e. regardless of whether such act has been implemented or not in any specific case. For example, if any legal provision stipulates that only male heirs have the right of inheritance over immovable property, then the female heirs should not wait for the concrete case for the examination of the inheritance to occur because they will be excluded from the inheritance based on such legal provision, but they will raise an initiative in the Constitutional Court, with which they will seek to initiate a procedure for evaluating the constitutionality of such an act, because it violates the right of citizens to equality on a gender basis, which is guaranteed by Article 9 of the Constitution of the RNM. In this case, the Court will cancel the act that was a source of violation of individual freedoms. In this way, not only the rights of the person who raised the initiative are protected, but also of all other persons, to whom such a provision would be applied.

The second way of direct protection of freedoms and rights by the Constitutional Court represents innovation in its constitutional tradition, because this way of their protection, for the first time it was foreseen with the Constitution of 1991, under the influence of the experience in Germany, Austria, Spain, in which countries the protection of the freedoms and rights of the citizen constitutes the largest volume of work of the Constitutional Court. This is intended to increase the guarantees for the protection of human and citizen freedoms and rights, as an essential element of a democratic society, although the volume of freedoms and rights protected in this way is somehow reduced to only those freedoms and rights provided for in Article 110, paragraph 3 of the Constitution of the RNM.

7. Conclusion

The conditions for submitting a request for the protection of certain constitutional rights and freedoms are stipulated by Article 51 of the Rules of Procedure of the Constitutional Court, according to which "any citizen who thinks that the act or individual action has violated the freedoms and rights guaranteed by Article 110 of the Constitution of the RNM can request protection from the Constitutional Court within two months from the date of receipt of the individual all-powerful act, respectively from the day when he became aware of the actions taken that caused the violation, but no later than 5 years from the time when such action was taken." The request must contain the correct data on the act or action that caused the violation, the reasons for which the violation exists, as well as the facts and evidence supporting the request. As a rule, the Court schedules a public hearing and by decision will determine whether the violation exists, and depending on it will cancel such individual act, or will stop the action by which the violation was committed or will reject the request.

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