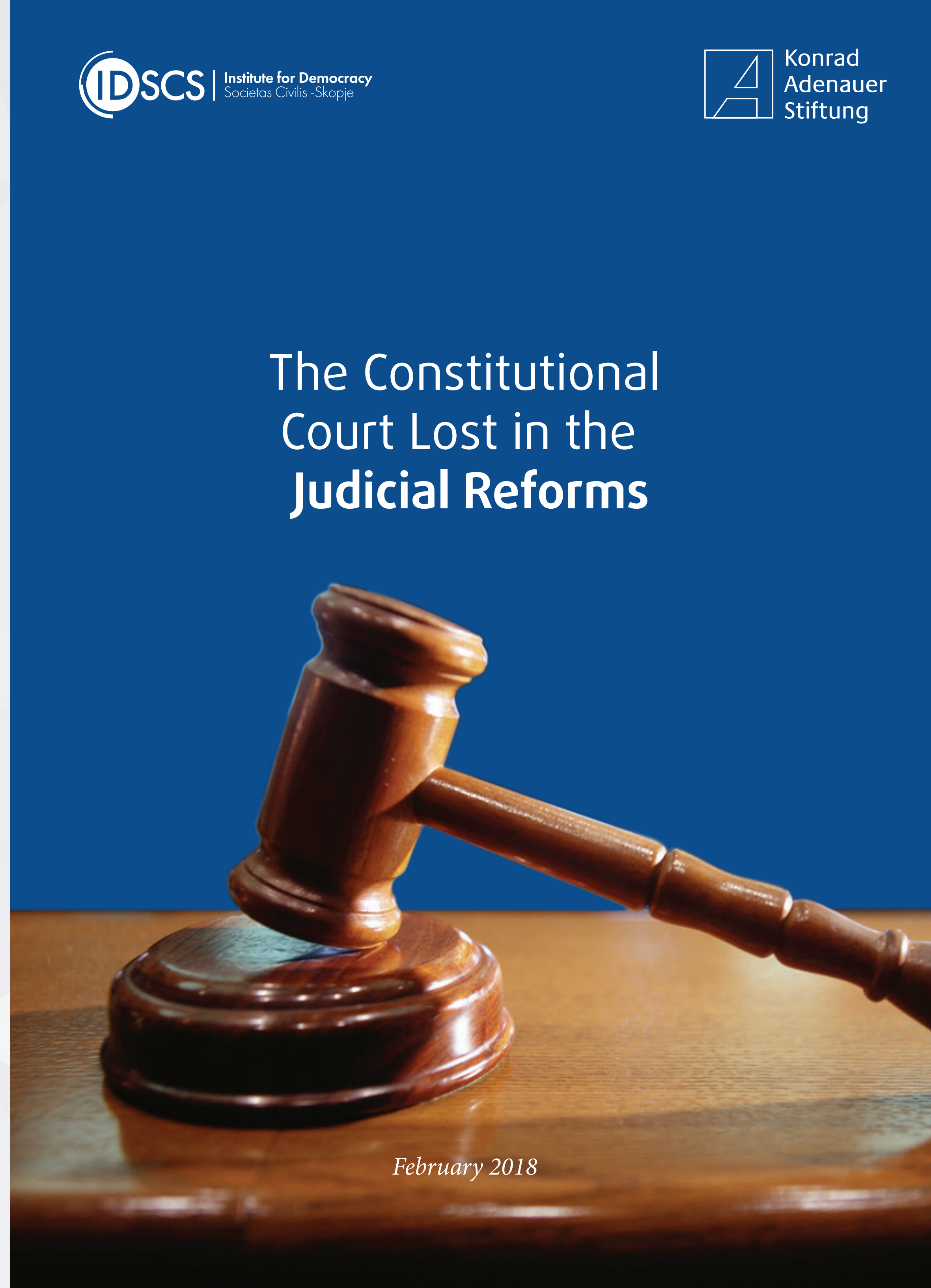
The Constitutional Court Lost in the **Judicial Reforms**

February 2018

Institute for Democracy Societas Civilis -Skopje

Konrad Adenauer Stiftung



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IMPRESSUM

Title: The Constitutional Court Lost in the Judicial Reforms

Publisher: Konrad Adenauer Foundation in the Republic of Macedonia
Institute for Democracy "Societas Civilis" – Skopje

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Peer Reviewer: Ivan Damjanovski, PhD

Translation: Jana Gjorgjinska (Nikuljska)

Design: Vladimir Barlakoski

This publication is available at:
http://www.kas.de/mazedonien/mk
http://www.idscs.org.mk

CIP - Каталогизација во публикација
Национална и универзитетска библиотека „Св. Климент Охридски", Скопје

342.565.2.047(497.7)

PRESHOVA, Denis
The constitutional court lost in judicial reforms : Електронски извор / [autor Denis Preshova]. - Skopje : Institute for Democracy „Societas Civilis", 2018

Начин на пристап (URL): http://www.kas.de/mazedonien/
Начин на пристап (URL): http://www.idscs.org.mk. - Текст во PDF формат, содржи 16 стр. - Наслов преземен од екранот. - Опис на изворот на ден 15.02.2018. - Фусноти кон текстот

ISBN 978-608-4775-34-8

а) Уставен суд - Реформи - Македонија
COBISS.MK-ID 106207754

THE CONSTITUTIONAL COURT LOST IN THE JUDICIAL REFORMS

Denis Preshova[1]

Introduction

Constitutional courts, as foreseen with the constitutions, are separate constitutional bodies that have the constitutional review as their exclusive competence. As a result of the significant role of constitutional courts in the constitutional and political systems, they constitute one of the key elements of the new constitutionalism that in the process of democratization in Europe[2] replaced the dominant paradigm of parliamentary supremacy. The new constitutionalism, as a doctrine of legal limitation of power, stipulates that the state power, including the judiciary, should be exercised in accordance with the constitution and controlled by a constitutional court as an institution specifically created for this purpose[3]. In this way, the new constitutionalism, and the introduction of the constitutional judiciary, establishes cooperation and one form of control over the ordinary judiciary that aims to ensure consistent respect of the constitution and the rule of law. This explains the importance of the constitutional judiciary for the functioning of the ordinary judiciary that, although often perceived as the "least dangerous

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2 Alec Stone Sweet, 'The Politics of Constitutional Review in France and Europe', 5 International Journal of Constitutional Law 2007, p. 74

3 ibid

branch" of power[4], is not immune to inconsistencies and disregard of the supremacy of the constitution and consequently of the principle of the rule of law, which can leave profound consequences. This form of external review over the judiciary is completely justified given the institutional design and the role of constitutional courts that should not affect the independence of the judiciary. On the contrary, the respect for the rule of law is in this way strengthened.

Considering this, the role of the Constitutional Court of the Republic of Macedonia is worth exploring in the light of the initiated reforms in the judiciary and the adopted Strategy for reform in the judicial sector for the period 2017-2022 with an Action Plan (hereinafter: Strategy)[5]. In this regard, although there are a multitude of issues that should be discussed in relation to the necessary reforms of the Constitutional Court[6], this analysis will address the potential positive impact that the Constitutional Court might have on the judiciary. Proper conceptualization of the competences and the procedures of the Constitutional court may significantly ensure, and improve, adequate constitutional review and the rule of law in the work of the ordinary judiciary. To this end, three issues related to the constitutional review will be examined in the context of the judicial reform. First, consideration will be given to past unsuccessful attempts to reform the Constitutional Court, including the fact that the final version of the Strategy does not mention anything related to this institution. Second, constitutional review will be considered in terms of the (non) existence of EU standards that need to be transposed in the domestic legislation as part of the EU accession

4 Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (Yale University Press 1986).

5 The Strategy is available at: http://www.pravda.gov.mk/resursi.asp?lang=mak&id=14

6 For more on these issues see: Denis Presova, "Constitutional Court Reform or Reform of Consciousness?" In Reform of Institutions and its Significance for the Development of the Republic of Macedonia, MANU, Skopje 2009, p. 171-202.

process. Third, two competences of the Constitutional Court will be presented, which must be seriously addressed and advanced in the future as part of the judicial reforms in order to enable this court to play a significant role.

Failed attempts to reform the Constitutional Court of the Republic of Macedonia

It can be ascertained without hesitation that the Constitutional Court of the Republic of Macedonia (Constitutional Court) is the most unreformed institution in the Republic of Macedonia. The Constitutional Court was established in 1991 pursuant to the provisions of the Constitution of the Republic of Macedonia. Since then, this institution has not undergone any substantive changes, with the exception of the constitutional intervention in relation to the composition of the court[7]. Namely, despite the numerous changes in the entire constitutional and political system in the past years, the Constitutional Court is still functioning in accordance with the same constitutional provisions from 1991 and the Rules of Procedure of the Constitutional Court of 1992. So far, there have been three relatively serious attempts to introduce some reforms in the constitutional judiciary.

The first attempt, albeit completely superficial, achieved to introduce some changes in relation to this institution in the context of wider constitutional changes in 2005. The judicial reforms that were initiated with the constitutional amendments,

7 Article 109, paragraph 2, amended with Amendment XV, Constitution of the Republic of Macedonia

initially envisaged introduction of an amendment that was supposed to create a constitutional basis for statutory regulation[8] of the matter related only to the decisions of the Constitutional Court, their effect and execution. Despite the suggestions and the encouragement of the European Commission for Democracy through Law at the Council of Europe, commonly known as the Venice Commission, for a more ambitious approach to this constitutional amendment, at the last moment, the Government of the Republic of Macedonia did not put the amendment in parliamentary procedure[9]. With this, the possibility to improve the situation with the Constitutional Court was lost at the time.

The second attempt took place in 2014. The proposed constitutional amendments foresaw to extend the corpus of rights and freedoms that would fall under the jurisdiction of the Constitutional Court, and introduce the possibility for the Constitutional Court to decide on appeals on decisions of the Judicial Council of the Republic of Macedonia in relation to the selection, dismissal or determination of disciplinary responsibility of judges and presidents of courts[10]. Again, the Venice Commission made certain suggestions and recommendations, however these constitutional amendments were never adopted because the parliamentary procedure for

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8 The Constitution of the Republic of Macedonia is unique in that, unlike all other constitutions in Europe that have introduced constitutional courts, it does not provide a constitutional basis for the legislative regulation of various aspects related to the Constitutional Court. See Article 113 of the Constitution of the Republic of Macedonia and Lucas Prakke and Constantijn Kortmann, ed. Constantijn Kortmann, Joseph Fleuren and Wim Voermans (Constitutional Law) of the 10 EU Member States: The 2004 Enlargement (Kluwer 2007).

9 See the European Commission for Democracy through Law - Venice Commission, Opinion on Draft Constitutional Amendments Concerning the Reform of the Judicial System in the "Former Yugoslav Republic of Macedonia", CDL-AD (2005) 038, paragraph 66, which refers to the then proposed Amendment XXXIV.

10 Draft Amendment XXXIX of the Constitution of the Republic of Macedonia.

their adoption was blocked due to political reasons[11].

The third, again unsuccessful, attempt was made with the initial version of the Strategy, which again envisaged the extension of the scope of the constitutional complaints to include greater number of rights and freedoms guaranteed with the Constitution[12]. For reasons that were not fully explained, the final version of the Strategy did not include anything related to reforms of the Constitutional Court. It remains unclear whether this is because there is an intention to create a special strategy that will cover these issues or not.

In the past period, the Constitutional Court made no initiative that would emphasize the need for any change related to its position, status, competence or any other aspect of the functioning of this institution. It is not surprising that there are no initiatives coming from the Constitutional court given the level of its isolation[13] and the commodity enjoyed by the

11 Venice Commission, Opinion on the Seven Amendments to the Constitution of the Former Yugoslav Republic of Macedonia CDL-AD (2014) 026, paragraphs 78-95.

12 Article 110 paragraph 1 line 3, Constitution of the Republic of Macedonia.

13 This isolation from the other three authorities, combined with the self-imposed isolation, keeps this institution often far from the public eye and is rarely subject to any analysis or debate. Even the last election of new constitutional judges in the Parliament passed without any public debate, although there were serious reasons for that.

constitutional judges[14]. The function of a constitutional judge is often perceived to serve to extend the working life of the judges beyond the general legal limit, to lead to peaceful retirement without excessive engagements during the nine-year mandate, and/or to enable sufficient time for thinking about, and preparing for, the pursuit of personal career ambitions in the country or abroad. Therefore, one should not wait for the Constitutional Court to make the initiative, because it is more than obvious that essential and well-thought-out reforms are needed in the shortest possible time.

EU standards and the constitutional review in the accession process

Transposition of the EU standards into the national institutional and legal framework is one of the necessary conditions in the EU accession process of the Republic of Macedonia. While the judiciary is set as one of the top priorities in this process, it is quite unclear what is the status of the constitutional review.

14 With respect to the scope of the work that constitutional judges have during the year, it would be interesting to compare the data with some of the countries in the region. For example, the Constitutional Court of the Republic of Macedonia had 265 cases in 2016 of which 161 were completed, and in the same year 181 cases were received. For more details see the Review of the Work of the Constitutional Court of the Republic of Macedonia for 2016, Constitutional Court of the Republic of Macedonia, available at: http://ustavensud.mk/domino/WEBSUD.nsf. In comparison, the Constitutional Court of Montenegro had 2594 cases in 2016 of which 1,163 were completed, and in this year 988 cases were received. For more details, see Statistical Review of the Constitutional Court's Work: For the period from January 1, 2016 to December 31, 2016, the Constitutional Court of Montenegro, available at: http://www.ustavnisud.me/upload/praksa.html

It is interesting to note that the EU's acquis does not mention any standards regarding the constitutional courts. Even Chapter 23 of the accession negotiations does not indicate any European standards that the European Commission (EC) would require to be transposed into the domestic institutional and legal framework of the candidate countries. Consequently, the accession process does not necessitate constitutional court reforms. The Council of Europe has adopted detailed standards for the constitutional courts, however, the EC does not refer to these and does not include them as part of the requirements in the accession process, which is not the case with regards to the ordinary courts. Also, within the EC's annual reports on EU candidate countries, questions related to their constitutional courts, if any, are noted in the section dedicated to the judiciary with sporadic comments on certain positions or decisions, often without specific recommendations[15]. Perhaps this is because constitutional courts are often, albeit rather incorrectly, perceived as an obstacle to the further and deeper integration of the EU[16].

On the other hand, constitutional courts are not considered inevitable part of constitutional and political systems. There are states with no constitutional judiciary, and whose judiciary does not have a competence of constitutional or judicial review, yet they are classified as advanced constitutional systems and developed democracies[17]. Claiming that the EC does not set standards on this matter to be transposed into the domestic legislation because constitutional courts are not a compulsory

15 See, for example, the EC annual report on Macedonia for 2016 p. 16, for Serbia for 2016 p. 64, for Montenegro for 2016 p. 56, for Albania for 2016 p. 13-16

16 For example, constitutional courts in the EU context are perceived as "brakesmen" or "Bremser". For more see Tomas Giegerich, Zwischen Europafreundlichkeit und Europaskepsis - Kritischer Überblick über die Bundesverfassungsgerichtliche Rechtsprechung zur europäischen Integration, 1 Zeitschrift für Europarechtliche Studien 2016, p. 5-47.

17 Such as the United Kingdom and the Netherlands.

element of the institutional structure in some of the EU member states is not spot-on. In fact, the EC does promote a strong judicial council as a model in spite the fact there is even bigger number of EU Member States that have not introduced a strong judicial council.

As a result of the absence of conditionality in the EU accession process for reforms in the constitutional judiciary these reforms are side-tracked, and their importance in the context of the reforms of the regular judiciary is not understood or is underestimated. Thus it seems that the institutions of the Government of the Republic of Macedonia perceive the reforms of the ordinary and the constitutional judiciary primarily through the prism of the strategic political goals and interests, and not from a standpoint of the essential interests of the citizens and the advancement of the fundamental values upon which the constitutional order rests. This superficial and short-term understanding of the reforms is a perfect recipe for unsustainability of the reforms in the medium and the long run, because the essential problems are not addressed in an appropriate manner and for the real reasons.

The Constitutional Court and the ordinary judiciary

The common perception and conclusion that the constitutional courts are institutions that are different from, and outside of, the ordinary judiciary must in no way point to the conclusion that there should be no connection between them. As a result of this position of the constitutional courts, it was often assumed that duality and parallelism exist between the constitutional courts, which have the exclusive competence to guarantee the constitutionality, on the one hand, and the ordinary

courts, which are obliged to protect the legality, on the other[18]. This view is not only contrary to the contemporary trends in the constitutional judiciary, but also to the views of Hans Kelsen - the originator of the centralized model of the constitutional review[19]. From the very beginning, Kelsen saw the connection between the constitutional and ordinary courts precisely in the procedure of concrete constitutional review initiated on existing and ongoing cases of the ordinary courts[20]. Hence, today there is no constitution in Europe that does not envisage both the abstract and the concrete constitutional review as competence of the constitutional courts[21].

Very often, in addition to this procedure, the jurisdiction of the constitutional courts for protection of the rights and freedoms through the institute of 'constitutional complaint' is also envisaged. In this way, the constitutional courts also act as last instance courts that decide solely on constitutional issues, such as on whether the rights and freedoms of a submitter of the constitutional complaint were violated in the court proceedings before the ordinary courts[22].

The legal order of the Republic of Macedonia foresees both

18 Frank I. Michelman, "The interplay of constitutional and ordinary jurisdiction" in Tom Ginsburg and Rosalind Dixon (ed.) Comparative Constitutional Law (Edward Elgar 2011) p. 278-298.

19 Hans Kelsen, On the Nature and Development of Constitutional Adjudication in Lars Vinx (ed.), The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law (CUP 2015) p. 65

20 Ibid

21 Maartje de Visser, Constitutional Review in Europe: A Comparative Analysis (Hart 2014) p. 133.

22 For more details, see ibid. p. 385-392.

competences and procedures before the Constitutional Court[23] through which it can exercise control and influence the work of the ordinary courts in order to protect the constitutionality and the constitutional rights and freedoms. But the concrete constitutional review and the constitutional complaint are totally inefficient and ineffective measures. Namely, since 1991, no initiative has been submitted before the Constitutional Court with a preliminary question on the constitutionality of a legal act in a procedure before the ordinary courts. On the other hand, to date, there is only one case where the Constitutional Court ruled that there has been a violation of a constitutionally guaranteed rights or freedoms[24].

There are many factors and reasons for such dire situations. When it comes to the concrete constitutional review, although a clear provision in Article 18 of the Courts Act exists[25], the judges are obviously not prepared and do not want to use it, and the Constitutional Court does not take any steps to encourage them[26]. There are three reasons for this. The first reason is

23 The concrete control is foreseen in Article 18 of the Law on Courts, Official Gazette of RM no. 58/06, 35/08 and 150/10. In theory this existed before the adoption of this legal provision with the actio popularis regarding the abstract control, that is, the possibility for everyone to submit an initiative before the Constitutional Court on the basis of Article 12 of the Rules of Procedure of the Constitutional Court.

24 The data was obtained from the Constitutional Court upon a request for access to public information registered under No. 22/17/3 from 11.07.2017. This is a decision in the U. case. No. 84/2009 of 10.02.2010.

25 The last proposed amendments to the Law on Courts proposed by the Ministry of Justice only intervene in certain inconsistencies of the provision that will not materially affect the current practice. The proposal of the Ministry of Justice from 18.01.2018 is available at ENER.

26 For example, when the Constitutional Court finds that there had been a violation of the rights and freedoms of the parties in a particular court case, because its decisions have been disregarded or Article 18 of the Law on the Courts had not been applied, such a ruling of the Constitutional court would encourage the regular courts to adhere to this obligation.

related to the fact that the procedure before the Constitutional Court can delay the court proceedings, which may cause that the ordinary judges lose points when their work is being evaluated by the Judicial Council since the relevant laws do not provide for such a situation. The second reason can certainly be found in the fact that in addition to the aforementioned legal provision there is no other legal norm that further regulates the procedure for initiation of concrete constitutional review by the ordinary courts. Even the Rules of Procedure of the Constitutional Court do not foresee such a specific possibility. This leads to a conclusion that such a request or initiative from the ordinary courts will be processed as any other initiative for abstract constitutional review. A third reason may be that the Constitutional Court does not have the necessary authority and reputation and therefore the ordinary judges do not consider addressing it. Furthermore, the election of constitutional judges is another factor, having in mind that there are no precise and objective criteria for their election[27]. If the constitutional judge is only a distinguished 'lawyer' without a significant contribution to the development of the legal system and the legal doctrine in the Republic of Macedonia, than it is quite understandable that such a judge could be underestimated and met with, in many situations justified, resistance. Such a situation and reasons related to the concrete constitutional review certainly can be demotivating for the judges to take any initiative; although none of these reasons is an insurmountable obstacle and can not fully justify the attitude of the ordinary judges.

As for the constitutional complaint, i.e. the request for protection of freedoms and rights, as it is called in the Rules of Procedure[28], the main reason for the disappointing situation

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27 Article 109, Constitution of the Republic of Macedonia: "The judges of the Constitutional Court are elected from among the distinguished lawyers."

28 Article 51, Rules of Procedure of the Constitutional Court of the Republic of Macedonia.

with the effectiveness of this institute can be found in the fact that the corpus of rights and freedoms that can be protected by the Constitutional court is very narrow, without any rational explanation for such selectivity[29]. On the other hand, there is the self-restriction through the traditionally represented rigid textualism, which is often applied by the Constitutional Court in the interpretation of the legal norms. This further narrows the field of action of the court, leaving the impression that it is not at all interested to play the role of protector of constitutional rights and freedoms[30]. As a result of such actions, the Constitutional Court continually misses valuable opportunities to develop the practice and doctrine in the area of rights and freedoms, and thus encourage the ordinary courts to refer to it and directly apply the constitutional provisions. On the contrary, based on the judgment of the ECtHR[31] and other cases before the same court that involve the Constitutional Court, it can be expected that the number of judgments in which the Constitutional Court is found as a violator of the rights and freedoms will very soon exceed the number of judgments brought by the Constitutional court which find that the constitutional rights and freedoms have been violated. This paradoxical situation basically reflects the entire work of the Constitutional Court.

We see from the above that such a narrow definition of the concrete constitutional review and of the constitutional

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29 The extension of the rights and freedoms that may be subject to protection before the Constitutional Court should not be perceived as problematic from the point of view of the efficiency of the procedure before the Constitutional Court because there is a series of procedural measures that would enable the Constitutional Court to adequately deal with a possible influx of higher number of constitutional complaints.

30 In this sense, the abstract control cannot be used as a substitute for the constitutional complaint, primarily because the nature and the character of the procedure differ from that of a constitutional complaint.

31 ECtHR, Selmani and others v. The former Yugoslav Republic of Macedonia, Application no. 67259/14, September 9, 2015

complaint makes the constitutional review, and the respect of the rule of law as the fundamental value of our constitutional order, ineffective. The biggest losers in this situation are the citizens of Macedonia as well as all other stakeholders, because they are denied the protection of their rights and freedoms before the domestic institutions[32]. Therefore, the extension of the constitutional complaint should not be seen exclusively through the prism of the effectiveness of this remedy in the context of the ECHR and the ECtHR; but rather as an issue of the highest interest of the citizens and as a need for the constitutionalisation of the legal system, mostly through the practice of the ordinary courts.

The process of constitutionalisation of legal orders has long been present in the developed EU legal systems[33], but unfortunately this process in the Republic of Macedonia lags behind because of the absence of a significant role of the Constitutional Court in the legal system and its impotence to uphold the constitutional values by enabling and promoting direct application of the constitutional norms in our legal system. This process of constitutionalisation involves the direct influence and invocation of the constitutional provisions, especially those devoted to constitutional rights and freedoms, in almost all legal branches. This would allow for direct application of the constitutional provisions, but also for a different way of interpretation of the legal norms than that of the restrictive textualism.

The almost non-existent judicial practice of direct application of the constitutional provisions and the rudimentary level of the judicial protection of the rights and freedoms in the

32 Article 110 paragraph. 1 line 3 and Article 50 paragraph 1, the Constitution of the Republic of Macedonia.

33 Alec Stone Sweet, Governing with Judges: Constitutional Politics in Europe (OUP 2000) p. 114-115.

Republic of Macedonia are key consequences of the situation with the Constitutional Court and the ordinary judiciary. Furthermore, the courts are not subject to external oversight by the Constitutional Court on issues related to the respect of the rule of law and the constitutionality, because there is a persistent rigid dual structure where the Constitutional Court has no points of contact with the courts, which is contrary to the modern trends.

Conclusion

There are obvious reasons for major and substantive reforms to the Constitutional Court, especially in the context of the judicial reform. The few attempts have thus far been unsuccessful. Although there is no conditionality as part of the EU accession process, the relevant institutions of the Republic of Macedonia must be guided above all by the interests of the citizens of the Republic of Macedonia and the need to improve the situation with the judiciary. The latter should be achieved with promotion and strengthening of the connection of the Constitutional Court with the ordinary judiciary through the two competencies and procedures that are conducted before the Constitutional Court – the concrete constitutional review and the constitutional complaint i.e. the request for protection of the freedoms and rights. Thus, cooperation with, and control over, the ordinary judiciary will be enabled, exclusively for the purpose of consistent respect of the rule of law through effective protection of the constitutionality and legality, and the rights and freedoms in the Republic of Macedonia.