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The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts

Report of
the Constitutional Court
of the former Yugoslav Republic
of Macedonia

I. THE CONSTITUTIONAL COURT, OTHER COURTS AND THE CONSTITUTIONALITY REVIEW

A. The judicial organization of the State

The new democracies of the South Eastern European countries have abandoned the constitutional principle of unity of powers, providing that principle of division of state powers, as system of state organization separated into legislative, executive and judiciary appeared as one of the features of the new democracies. Such is the case with the Republic of Macedonia, which after the dissolution of former Yugoslavia has associated the large family of countries of Central and Southeast Europe that proclaimed the principle of division of state powers as one of the crucial principles of contemporary democratic systems. Bearing in mind the respective principles contained in the Constitution, the state organization is conceived as a structure of independent, relatively parallel powers, status, competencies and relations of which are constitutionally defined and guaranteed. Herein, one cannot speak of higher or lower authority but of different powers subordinated first of all to the Constitution and the mechanisms for control of the constitutionality and legality of their work. Within this framework, the judiciary represents undoubtedly an unavoidable element and a segment of the state organization. Thus, it is not occasional that the Constitution devotes considerable part to constitutional premises and general organization of the judiciary.

Thus, the judiciary is enforced by courts, organization of which is unique. If we consider the aims and functions of the judiciary, including: impartial law enforcement, advancement and respect of human rights and freedoms, and the provision of legal certainty, then the constitutional determination for independence and autonomy of the judiciary, while applying the law in each individual case and in general (the constitutional ban for political organization and activity in the courts derives therefrom) becomes clear. While enforcing their aims and functions, the courts work only on the base of the Constitution, the laws and international agreements ratified in accordance with the Constitution. Considering the unique organization of the courts it may be said that in the Republic of Macedonia the judiciary is organized in three levels: municipal, appellate and the Supreme Court of the Republic of Macedonia. There are 27 municipal courts as first-instance courts in the Republic of Macedonia. They cover certain area, provided that one municipal court serves the area of one or more municipalities. There are three Appellate Courts, as second-instance courts, which decide upon appeals lodged against municipal courts` decisions. They also decide on conflicts of jurisdictions of municipal courts at their area, etc. The Supreme Court is the highest court in the country, which takes care and secures the unity in law enforcement by the courts. It decides as a third and last instance upon appeals lodged against Appellate Courts` decisions. It also decides in first and second (last) instance in administrative disputes; it decides upon extraordinary legal remedies against valid judgements; decides upon conflict of competencies between municipal courts from areas of different appellate courts; between appellate courts and municipal courts and between the appellate courts themselves etc. Having in mind the three-sided division of state powers and the position and organization of judiciary (ordinary) a question on the position and role of the Constitutional Court, its relations with different branches of state power, especially with the third one, the judiciary is put forward.

As is already known, the Republic of Macedonia belongs to the circle of countries that has accepted the so-called European (centralized) model of constitutional judiciary, where the

judicial review of constitutionality and legality is performed by the Constitutional Court, as specialized institution that has an exclusive (monopolistic) right to conduct this immensely important function. As body of the Republic, jurisdictions of which derive from and are legally based directly on the Constitution itself, the Constitutional Court is a specific constitutional category not subjected to statutory regulation; it is a category that is given a high level of legal jurisdiction and powers, different from those incorporated into three-sided system of division of powers. Basically, it has a *sui generis* role protecting the constitutional order and safeguarding the principle of the rule of law, constitutionality and legality, respect and protection of human rights and freedoms. The Constitutional Court is neither subordinated to other holders of separate government powers nor it is their constituent part. It is integrated, neither organically nor functionally, within the ordinary judiciary. Although it resolves conflicts, the nature and significance of these conflicts for the overall relations in the society are such that distinguish the Constitutional Court as an autonomous and independent authority, directly responsible to eliminate eventual abuses or violations of law. The protection of constitutionality and legality legitimates the Constitutional Court as guardian of the normative unity within the legal system and directs it towards ensuring the structural and functional relations in the system of governance.

B. The respective jurisdictions of the Constitutional Court and the other courts in the area of constitutionality review

§ 1. Type of review i.e. assessment

As constitutional category with precisely determined jurisdictions and competencies in enforcing the legal order and safeguarding the constitutional principles, the Constitutional Court is bind right with the constitutional provisions, which determine the capacity and volume of its competencies. Namely, The Constitution clearly enumerates Court's competencies and determines it as a State body that safeguards the constitutionality and legality. In implementing this function the Constitutional Court is vested to decide on the compliance of laws with the Constitution and on the compliance of other regulations and collective agreements with the Constitution and laws. Thus, the issue of the type of acts that Court is competent to review becomes crucial one, which determines the volume of Court competencies in enforcing the judicial review. Thus, laws, collective agreements and other regulations are in the focus of Court's attention. This undoubtedly indicates that judicial review may be carried out over acts (laws) passed by the legislature, the executive, units of local self-government and other holders of public authorizations, acts of which concern the rights and obligations of the citizens, in a general way. Court judgements do not qualify for in the group of acts appropriate for judicial review. They may be subject of observation by the Constitutional Court only in the case of human rights and freedoms protection for which the Court is competent to decide (more on this later on).

Concerning the judicial review carried out by the Constitutional Court of the Republic of Macedonia it is appropriate to stress its timing and nature, as well as the *locus standi*.

Having in mind these criteria one could say that the judicial review is of repressive, *a posteriori* character and by virtue of its nature it is an abstract one. However, it can be realized in abstract and in a concrete form. The subject of judicial review may be only an act that has been already adopted and as such produces legal effects. Preventive (*ex ante*) review is fully excluded irrespective of the character and type of act at issue. The assessment of

constitutionality and legality by the Court is not undertaken on the occasion and due to the application of a given law or regulation, but it rather aims to protect the rights, relations and values incorporated into the constitutional order. This is the so called "abstract dispute" concerning constitutionality and legality of regulations as such, where the Court intervenes irrespective of the application of the law in the concrete dispute or other adversarial litigation. By assessing the constitutionality and legality of disputed acts and by eliminating provisions that are defected or inconsistent with the constitutional and legal framework, the legal system is pureed from any normative bases for violating the fundamental values enshrined in the Constitution. In such way, the Court exercises its powers in Kelzen`s meaning of "negative legislature" that extorts influence over the other branches of powers. This control strengthens the position of the Parliament by providing it with constructive guidance in its legislative efforts to comply with the criteria of "appropriateness", and the Executive is directed to perform and develop its functions in line with the conditions and procedures determined by law.

§ 2. Commencing a procedure before the Constitutional Court

The procedure for assessing the constitutionality and legality may be initiated by everyone (an individual, the Parliament, the Government, a legal entity, association of citizens, public institution, municipality, etc.), including the Constitutional Court itself in cases when on its own motion it reviews the constitutionality and legality of provisions not disputed with the petition. The lack of any restriction to commence proceedings *ex officio*, stresses out the fact that the Court is not a passive arbiter in the cases of constitutionality and legality, but an active player in its protection. The unlimited possibility for *actio popularis,* where no legal or personal interest is required to take an action before the Court, nor time limits for raising such action exist, represents a wide basis that brings the Constitution closer to the citizens, thus creating real preconditions for the same to be felt directly in all fields of social life.

Besides *actio popularis*, as fundamental tool in safeguarding the constitutionality and legality, which is most often applied in Court practice, there are other legal instruments available to persons in the protection and attainment of their rights and freedoms depending on the concrete procedure. Thus, the procedure for determining responsibility of State’s President is considered commenced with the day of lodging the proposal by the Parliament of the Republic; the procedure for protection of human rights and freedoms is initiated by virtue of a request for protection of human rights and freedoms (somewhat later more on this procedure); a proposal for settlement of the conflict of jurisdictions among certain branches of powers on horizontal or vertical level can be lodged by each of institutions involved in the dispute occurred, as well as by everyone who due to the conflict cannot attain a legitimate right etc. A petition for assessing the constitutionality and legality (*actio popularis*) is mostly used instrument in the work of the Constitutional Court. As an illustration, out of 230 cases in 2000, only 9 referred to request for protection of human rights and freedoms, while all the remaining were petitions challenging the constitutionality and legality of laws, collective agreements, statutes of political parties and of associations of citizen, acts of the Government and of certain Ministries, acts of the municipalities and public undertakings, as well as of other legal entities etc. This trend was also present in Court work in previous years: in 1999 out of a total of 241 cases, 219 referred to petitions challenging the constitutionality and legality, while 16 were requests for protection of human rights and freedoms; in 1998 out of a total of 233 cases, 205 were *actio popularis* and 13 were requests for protection of human rights and freedoms. It is clear from these figures that the protection of constitutionality and

legality (judicial review) absorbs other Court competencies and it's real indicator of enforcement of the Constitution in the judicial practice.

§ 3. Preliminary issues – plea of unconstitutionality

Besides the abstract form, the judicial review can also be exercised in the so-called concrete or incidental form (by posing preliminary question on constitutionality). This type of review arises in cases where the petition for assessing the constitutionality is submitted by ordinary courts regarding laws they have to apply in a concrete case (civil, criminal, and administrative). Thus, if the court alleges that the law, which need to be applied in the case is inconsistent with the Constitution and the constitutional provisions cannot be directly applied, it furnishes the Constitutional Court with petition challenging the constitutionality. Here, until the decision on compliance of the law with the Constitution is rendered, the court *a quo* stays with the procedure.

Each court has the right to lodge a petition challenging the constitutionality of a law, which is about to be applied in a concrete case pending before the ordinary court. Considering the unique organization of the judiciary in the Republic of Macedonia, this means that a petition may be lodged by any municipal, appellate or the Supreme Court of the Republic of Macedonia, thus becoming party in the proceedings before the Constitutional Court. The court *a quo* has a discretionary right to determine whether it will lodge a petition to the Constitutional Court or not. Based on its own belief on the constitutional foundation of the law at issue, the court may refer to the Constitutional Court as the only competent body to decide *in meritum* on the compliance of laws with the Constitution. Thus, the court may decide not to refer to the Constitutional Court if it assesses that it may directly apply the constitutional provisions. What is important to be stressed out is that the courts decide by virtue of the Constitution, laws and international agreements ratified in accordance with the Constitution. This means that subject of assessment before the Constitutional Court by an ordinary court cannot be an act having legal force subordinated in relation to a law.

Being submitted to the Court, petition lodged in this concrete or incidental form is treated in absolutely identical way as all other petitions lodged by any other entity. In this case, the court *a quo* appears as party in the procedure, as one that lodged the petition and the Parliament of the Republic, as one that has adopted the law in question. The parties in the procedure (civil, non-contentious, criminal, administrative dispute) pending before the ordinary court, wherein doubts in the constitutionality of certain law have hoisted, have no possibility to object the decision of the court to lodge a petition challenging the constitutionality of a given law. The only remedy available to parties is to appeal the court decision for ceasing the procedure conducted by that court. This has no influence over petition lodged before the Constitutional Court for assessing the constitutionality of the law, but it serves to re-judge the appropriateness of the decision rendered by the regular court to halt with the procedure. The procedure upon the appeal is urgent.

When lodging a petition with the Constitutional Court all procedural (formal) preconditions, which equally refer to all petitions irrespective of the petitioner, have to be respected. Petitions, which must be in written, are required to contain certain information as basis for Court action. These information aim to identify the petitioner (possibility for anonymous petition is excluded), to specify the contents of the request (provisions which in petitioner's

view does not comply to current constitutional premises), reasons for alleged unconstitutionality and constitutional provisions that are violated by law disputed.

It is in this stage of procedure that a preliminary assessment of admissibility i.e. acceptability of petition lodged is made. Namely, in case the petition does not contain the required information, the Constitutional Court shall notify the petitioner about the shortages and shall designate a fair term for their correction. In case the shortages are not corrected within the given time or in case of anonymous petition it shall be considered that the petition has not been filed. The same refers to cases when it is apparent that the Court has no powers to act upon the petition lodged. Namely, when the petition requires opinion, explanation or intervention in front of other bodies, the Court shall notify the petitioner in written (in this case the ordinary court) that it is not competent to decide on such issues. It is important to note that in all of these cases when it is obvious that not all procedural preconditions for Court action are fulfilled, it does not adopt a formal act i.e. decision by which the case is returned, namely rejected. Regarding these petitions, the procedure ends with a written notice to the petitioner about the incompleteness i.e. non-competence of the Court to decide. This communication between the Court and the petitioner is exercised by the Secretary General of the Constitutional Court.

After it is decided that this concerns a properly lodged petition, the Court commences the so-called preliminary procedure wherein it undertakes full analysis of the case i.e. it determines all legal and factual issues relevant for proper decision making in the concrete case. The justification (reasons) of the complaint which the court *a quo* (as petitioner) has presented as argument for the judicial review is very important for this segment. This is because in certain cases the insufficiently or incorrectly justified petition may bring to its rejection i.e. there will be no involvement of the Constitutional Court in a meritory discussion on the essence of the problem. Here the Court can not ignore the statements of the court *a quo* presented in the petition, but it is also not bound by its opinion or arguments presented therein. Thus, as already mentioned, the Constitutional Court may decide to extend petition lodged i.e. to base it on a different argument than the one stated in the petition itself, even to undertake judicial review of other regulations or provisions of the law disputed, which have not been covered by the petition. The Court takes such action *ex officio* provided that parties in the procedure before the court *a quo* have no influence in decision making by the Court in this respect.

If we consider the abstract nature of the judicial review enforced by the Constitutional Court, in each and all cases, it becomes clear that in assessing the constitutionality of the law disputed by a court *a quo* the issues related to the concrete case before the court *a quo* have no influence on the Court in adopting the final decision. The abstract dispute on constitutionality is conducted fully independently from the dispute pending before the regular court. This statement may be supported by the fact that decisions of the Court are of general binding nature for all participants in the legal system. Thus, although this type of protection of constitutionality appears as regards concrete case of non-constitutional character, the eventual rejection of the law from the legal system shall refer to all persons and not only to the parties in the concrete case pending before the regular court (the court *a quo*).

However, what can significantly influence the final result in the procedure before the Court is the legal force of the law i.e. of the legal provision, constitutionality of which has been disputed. *A posteriori* abstract review assumes full validity of the act i.e. provision which is subject to analysis and assessment. This means that an act (provision) which have ceased before a petition to the Constitutional Court being lodged, cannot be subject of judicial review

and in such case the Court shall reject the petition due to lack of procedural preconditions for decision making. However, the practice has shown that it is possible to come to an amendment (abolition) of the law after petition is filed. In such a case, the Court has a number of instruments available, application of which will depend on the moment when the amendment (abolition) of the act occurred and the stage of procedure pending before the Court. Thus, in case the act ceased to be valid during the preliminary procedure (this is the stage before the Court adopts a decision for commencing the procedure for judging the constitutionality) the Court shall reject the petition due to lack of procedural preconditions for decision making (lack of act). In case the act ceased to be valid after the Court commenced the procedure for assessing the constitutionality (as an interphase when the Court raises reasonable doubt in the constitutionality of the law), than the Court has two options available: to cease with the procedure or to continue it, which depends on the assessment whether reasons exist for assessing the constitutionality in time the law being valid.

An interesting issue deserving appropriate attention is the type of entities that can participate (directly or indirectly) in the Constitutional Court procedure. Basically, in procedures in front of the Constitutional Court there are two categories of entities that can participate in the procedure: participants in the procedure and parties concerned. This categorization refers to all forms of judicial review irrespective whether it is performed in abstract or concrete (incidental) form. In the later case, as participants appear the courts *a quo* (as petitioner) and the one who adopted the disputed act. All other participants fall into the group of parties concerned, which may participate in the procedure before the Constitutional Court on different bases and in different capacities. Thus, there is a general obligation for all to provide data and information to the Constitutional Court on all issues of interest for the procedure. Also, during the preliminary procedure each party concerned may be called for a consultation and necessary information and explanations to be requested from it. Here, any activity or engagement of the Court in this field ought to be interpreted only in the spirit of need to clarify all facts and full determination of the legal and factual state. Which individuals shall be invited or from whom certain information shall be requested depends on each concrete case and the concrete circumstances of the case. Shall this be the parties in the procedure pending before the court *a quo* or third party concerned, the Court determines by itself on grounds of its own belief and needs of the concrete case. Most often this concerns certain institutions, professional bodies and organizations, professional and scientific workers indicated by the Court for whom it is assumed that shall contribute to the clarification of certain issues of interest for the Court. Beside this informal type of communication, parties concerned may also be invited to take part in the so called preliminary session or public hearing organized by the Court when needed, aimed to fully and properly determine the legal and factual state of the case. This means that as parties concerned may appear the parties of the case pending before the court *a quo*, not in compulsory form but only if the Court finds that their participation is needed in the procedure. Considering that the abstract dispute on constitutionality is conducted fully independently from the concrete dispute pending before the court a *quo*, the factual state of affairs in the regular court has no procedural or functional connection with the procedure developing in the Constitutional Court. These are two completely different and separate procedures which are unified only through the court *a quo* which appears as petitioner before the Constitutional Court. If death of a party in the case pending before the court *a quo* has occurred or the same has withdrawn the charges, it has no influence on the procedure for abstract judicial review enforced by the Constitutional Court. Relations that exist in the dispute at the court *a quo* level are irrelevant for the Constitutional Court. This is also because the decision made by the Court on the petition of a court *a quo* shall not produce legal effects only in respect of the parties in the procedure pending before

that court, but it shall have an *erga omnes* effect. It may only become relevant for the Court if the court *a quo,* as participant in the Constitutional Court procedure decides to withdraw the petition. In such case if procedure for judicial review has been commenced, the Court may halt the procedure if it cannot find reasons to continue it, which could be done at its own initiative.

§ 4. Procedure for protection of human rights and freedoms

Besides the abstract review of constitutionality and legality, the direct judicial review of human rights and freedoms represents also an essential element within the frames of competencies of the Constitutional Court, thus verifying and stressing the importance of such a protection of highest constitutional ranking.

The competency of the Constitutional Court to decide on protection of human rights and freedoms is provided for in the Constitution itself. In that context, it is important to state that contrary to other countries that provide for constitutional protection of all constitutionally guaranteed human rights and freedoms, the Constitution of the Republic of Macedonia is rather restrictive, opting for the system of positive enumeration of the freedoms and rights, protection of which is in the competence of the Constitutional Court. Namely, the Constitutional Court of the Republic of Macedonia protects the human rights and freedoms in respect of the freedom of belief, conscience, thought and public expression of thought, political association and activity and the ban on discrimination of citizens based on gender, race, religion, national, social and political affiliation. Thus, the restricted competence of the Court to protect only certain personal and political freedoms and rights and not the socio-economic and cultural human freedoms and rights, the protection of which falls in the competence of other constitutionally determined entities, is clearly seen. Such a limited provision is narrowing the scope of activity of the Constitutional Court in respect to protection and safeguarding the efficient attainment of freedoms and rights. It also makes individual referral in respect of protection of other constitutionally guaranteed freedoms and rights, for which the Court is not competent to decide as inadmissible.

Differing from constitutional and legal systems of a series of countries that provide for constitutional appeal, as distinct remedy for protection of human rights and freedoms, the Constitution of the Republic of Macedonia does not recognize the constitutional appeal as remedy for enforcing this type of protection. However, almost analogue to constitutional appeal, the direct protection of freedoms and rights may be enforced through the request for protection of human rights and freedoms. Contrary to *actio popularis*, which provides for protection of fundamental freedoms and rights in public interest, the request for protection acts in private, personal interest. The petitioner initiates procedure for protection of human freedoms and rights, for which it alleges that have been violated by final or valid individual act or activity.

"Each citizen considering that…. a right or freedom have been violated…" may appear as petitioner of the request for protection of human rights and freedoms. The grammatical interpretation of this provision implies that a petitioner can only be natural person, an individual or a group of individuals. The term " every citizen" implies exclusion of legal entities from the list of authorized applicants. In more precise determination of the authorized applicant it is possible to go even deeper, reducing the possibility to file the request to only the one who "considers" that a certain right or freedom has been violated. Thus, the request

cannot be filed on behalf and on account of another individual. Only the one who considers, who thinks that a right or a freedom of his/ her is violated may appear as applicant of the request for protection of human rights and freedoms. The right to file application through an attorney based on an authorization is not excluded.

The application for protection of freedoms and rights may be filed only against individual final or valid acts or activity. This means that in enforcing this protection, the object of observation by the Constitutional Court cannot be general acts, laws and sub-laws (regulations). Herein, this refers to acts having individual character that set certain rights and legal interests of certain individuals. Here, these individual acts necessarily have to be final, i.e. valid, which may bring the conclusion that this concerns the subsidiarity of the request for protection of the human rights and freedoms. Namely, the Constitutional Court provides constitutional protection only of those freedoms and rights that are set by the Constitution. This means that in respect of these rights and freedoms it appears as first and last instance in decision making. The procedure of the Constitutional Court is direct and is directly enforced in respect of individual final or valid acts or activities, through which the alleged violation has been performed. This concerns acts by which individual interests of a person (applicant) have been violated causing direct, individual and current damage due to application of the concrete individual act or activity.

Similar as in the procedure for abstract control of constitutionality and legality, there is in the procedure for protection of freedoms and rights a so called phase of preliminary scanning of the admissibility of the request. In this stage preliminary review of the filed request is carried out by testing it for completion of the procedural preconditions so that the procedure may continue. Thus, the request for protection of freedoms and rights necessarily has to contain the following elements: the reason because of which the protection is requested, the acts or activities that violate the freedoms and rights, the facts and evidence on which the request is based, and information to identify the petitioner. In case the request filed is incomplete and the defects are not corrected, it shall be considered that the request has not been filed. Herein, the Court shall deliver no decision, but the fact shall only be stated on the request notifying the petitioner on the same. Besides, there are time limits wherein a request for protection of human rights and freedoms may be submitted. Thus, protection from the Constitutional Court may be requested within 2 months from the day of delivery of the final or valid individual act, namely from the day of finding out that an activity creating violation has been undertaken (subjective term), but not later than 5 years from the day of its undertaking (objective term). These terms are preclusive and disrespect i.e. exceed causes refusal of the request on the ground of lack of procedural preconditions for decision making by the Court (by a formal decision for rejection).

By rule, the Constitutional Court decides on protection of freedoms and rights through public hearing. Participants in the procedure (petitioner, the one who has adopted the act i.e. the one who has undertaken the action which is assumed to produce the violation) and the Ombudsman are invited to attend the public hearing. The public hearing may be held if some of the participants in the procedure or the Ombudsman are not present if they have been properly invited. If necessary, the public hearing may be attended by other persons, bodies or organizations if the Court determines the need for their presence aiming to clarify the legal and factual state of the case. The petitioner (or his authorized representative) has the right to present the case and to inform the Court directly on all facts relevant for decision making. Herein, new evidence and information essential for meritorious decision making being unknown to the Court in the preliminary procedure can be presented.

II. THE RELATIONS BETWEEN THE CONSTITUTIONAL COURT AND OTHER COURTS OF THE REPUBLIC OF MACEDONIA

A. The Organic link

The issues in respect of composition, conditions and procedure for election of judges of the Constitutional Court are fully set by the Constitution so that none of these issues is regulated by a law.

In this respect the Constitution provides that the Constitutional Court is composed of nine judges. The Amendment XV to the Constitution of the Republic of Macedonia provides that the Assembly elects six of the judges of the Constitutional Court by majority vote of the total number of MPs. The Assembly elects three judges by majority vote of the total number of MPs where there should be majority of votes of the total number of MPs belong to communities, which are not the majority population in the Republic of Macedonia. The mandate of the judges is for nine years without right for re-election.

The Constitutional Court judges are elected from among outstanding lawyers.

The Assembly of the Republic of Macedonia elects two judges at proposal of the State Judicial Council, and two at the proposal of the President of the Republic. The proposal for election of the remaining five judges of the Constitutional Court is in the competence of the Commission on election and appointments which functions as a permanent working body of the Assembly established by the Rules of Procedure for its work.

In respect of election of judges of other courts in the Republic of Macedonia, the Constitution provides only for the issues in respect of their mandate (they are elected without limiting their mandate), the body competent for their election and release (the election and release of judges is done by the Assembly of the Republic of Macedonia) as well as the body authorized to propose election and release of judges (the Assembly of the Republic of Macedonia elects and releases judges on the base of a proposal from the State Judicial Council).

Other issues related to the election of these judges (conditions and election procedure) are provided for in the Law on Courts.

According to this law, the Assembly of the Republic of Macedonia announces the election of judges for a corresponding court in the official bulleting of the Republic of Macedonia (the "Official Gazette of the Republic of Macedonia") and the daily press 15 days at latest from the date of the adoption of the decision on the number of judges in the corresponding court, i.e. immediately after the vacancy of a judge's seat. Interested candidates may file their applications within 15 days from the date of publication in the "Official Gazette of the Republic of Macedonia" to the State Judicial Council.

A citizen of the Republic of Macedonia fulfilling general conditions set out by law for employment in bodies of the state administration being a graduate lawyer and enjoying respect for the execution of the function of a judge may apply.

Beside the stated conditions for a judge of a municipal court the individual should have over five years working experience with confirmed results in legal matters after passing the judicial exam, while an appellate judge should have over nine years of experience.

For a judge of the Supreme Court the individual should be first of all a prominent legal expert with working experience in legal issues of over 12 years. An intra- or extra-mural university professor teaching law related to court decision making for more than 10 years may be elected for a judge of the Supreme Court.

It may be concluded from the above mentioned that there is no organic link between the Constitutional Court and other courts in the Republic of Macedonia. This means that from the aspect of their composition and election they are separated among themselves i.e. independent one from the others.

B. Procedural link

The procedural links between the Constitutional and other courts in the Republic of Macedonia in the normative-legal field results from the Rules of Procedure of the Constitutional Court which set the manner of work and procedure in the Constitutional Court and more concretely from the Law on Courts.

According to the Rules of procedure, the procedure for judging the constitutionality and the judicial review of other regulations and general acts is initiated by a decision of the Constitutional Court based on an initiative which may be submitted by everyone including the courts, too. Other courts as petitioners for judging the constitutionality of a law may appear in respect of application of a certain law in a procedure pending for a concrete case (decision making based on preliminary issue) which has been elaborated beforehand. However, in the proceedings before the Constitutional Court, other courts have the status of participant as all other petitioners, so that the provisions of the Rules of Procedure apply to them too. In this respect the Rules of Procedure provide for a possibility for a direct meeting of judges of the two courts in the form of consultative dialogue aiming to exchange opinions, information and explanation in respect of given disputed legal or factual issues and other circumstances relevant for Court's decision making.

Since the adoption of the Constitution in 1991, since when the Republic of Macedonia is independent, until now the judicial review practice of this Court has not recorded a case where other courts initiate a procedure (dispute), i.e. to file a petition before the Constitutional Court. Because of that there were no meetings between judges of both courts and the usefulness of such an option cannot be commented upon from practical reasons.

Such practice has not been applied even in cases when the Constitutional Court acted upon requests of citizens for protection of freedoms and rights provided in Article 110 paragraph 3 of the Constitution of the Republic of Macedonia when they considered that certain of these rights or freedoms have been violated by a valid decision of other courts. This is first of all a result of the fact that such request by citizens in majority of cases, after preliminary procedure being completed, have been found as filed after expiration of time limits set out by the Rules of Procedures or concerned rights and freedoms, protection of which was not in competence of the Constitutional Court, because of which the procedure based on these requests the Court completed by rejection of the request.

C. Functional link

In exercising its competencies, the Constitutional Court when deciding on the essence of the issue, makes decisions of various type depending on the request filed in the Court. Thus, if this concerns the assessment of constitutionality of a law or the judicial review of a regulation or a general act the Court shall repeal or annul by decision such a law or other regulation if it finds that they do not comply with the Constitution i.e. the law. This type of decisions as a method of assessment by the Court are set by the Constitution and the Rules of Procedure, too.

An exclusion from this rule is set in article 70 Paragraph 6 of the Rule of Procedure according to which the Court makes a decision for determination of a law as unconstitutional i.e. unconstitutionality of a regulation or other general act during its validity which ceased to be valid during the procedure if conditions for their canceling exist. This is the only case when the Court may adopt a determinative decision on the unconstitutionality of a law i.e. the unconstitutionality and illegality of other regulation or general act while in other cases such a decision of the Court is contained in the explanation of its repealing or annulling decisions.

When the Court finds that the disputed law or other regulation or general act is in compliance with the Constitution i.e. with the law than it adopts a decision not to commence the procedure on the assessment of their constitutionality i.e. constitutionality and legality. This means that the Court when deciding that a law or other regulation or general act is in compliance with the Constitution i.e. the Constitution or the law, than there is no decision made on the assessment of their compliance with the Constitution i.e. the Constitution and the law, but such an assessments is declared in the explanation of the decision for not commencing the procedure.

Further, in case the request directed to the Court refers to protection of freedoms and rights which are in its competence, than the Court by decision determine if there is a violation and depending on that shall state the individual act that violates these freedoms or rights as void (in case such an act is a valid court decision, than the Court shall abolish such a court decision) or shall reject the request.

As for validity and enforcement Court's decisions (Article 112 Paragraph 3 of the Constitution) they are binding for all bodies, organization and institutions including other courts too.

The legal action i.e. effects Court decisions depend on the type of decision. Thus if this concerns a decision of the Court annulling a law or other regulation its action is *ex tunc*. According to this principle such decisions of the Court act besides in the future retroactive too i.e. backward from the moment of adoption of the canceled law or other regulation. The consequences of the application of the canceled law or other regulation are remedied by return to matters to their previous state i.e. in the state that existed before the adoption of the law or other regulation itself.

In pursuance to such legal effects of the annulling decision, in order consequences derived from the application of the law or other regulation to be restore, each person, right or legal interest of whom has been violated by individual final or valid acts adopted in administrative, judicial or any other procedure based on law or regulation which is canceled by decision of the Constitutional Court is rightful to seek from the competent body to cancel or modify such

an individual act. According to Article 81 of the Rules of Procedure of the Constitutional Court this right may be used within 6 months from the date of publication of the Constitutional Court decision in the "Official Gazette of the Republic of Macedonia".

However, in no process law of the Republic of Macedonia there is a firm provision that a renewal of a court procedure may be requested even in case when by a Constitutional Court decision, a law on the base of which a valid court decision is made, is canceled. However the absence of such a provision should not represent an obstacle for the competent court to decide on a concrete request of a party for annulling (or modifying) valid court decision on this base as the annulling decision of the Constitutional Court binds it to that, since its legal effects refers to everyone (*erga omnes*) thus to other courts too.

In respect of enforcement of valid court decisions and of final or valid concrete acts of other bodies adopted on the base of a law or other regulation which is annulled by Constitutional Court decision, the impact of such a decision of the Court is reflected in way that enforcement of these acts can not be permitted, nor be implemented and if the enforcement has started – to stop it. The impact of the Constitutional Court decision annulling a law is also reflected on all procedures in other courts being in procedure on requests for implementation i.e. protection of rights of the citizens based on the annulled law. In such case the competent court in deciding upon individual requests cannot apply the law i.e. the regulation which is canceled but shall apply the laws i.e. regulations that were applicable before the law that has been canceled.

In difference from the annulling decisions, the legal effects of the Constitutional Court decisions by which a law, other regulation or general act is repealed refers only to the future which means that the repealed law, other regulation or general act ceases to be implemented and to produce legal effects *ex nunc* (from the repeal onwards), and the consequences of the application until the repeal remain i.e. are not remedied by returning to the previous state. This practically means that all final or valid individual acts adopted based on law, other regulation or general act which are repealed by Constitutional Court decision, enforcement of which has been completed remain, i.e. their annulment, abolition or change cannot be requested.

In respect of procedures pending before the courts or in other bodies as well as in respect of final and valid individual acts, enforcement of which is not completed, the legal effect of the repealing decision are the same as of the Court's annulling decision.

In analogue application of the rule of derogation according which the act i.e. the norm of a higher legal instance is abolishing the act (norm) of a lower legal instance, other regulations and general acts i.e. norms based on law which is canceled or abolished by Constitutional Court decision share the destiny of the canceled or abolished law i.e. norm. Namely, according to this rule, the canceling or abolition of the law by the Court's decision should mean automatic canceling or abolition of other regulations and general acts based on that law. Guided by this rule the Constitutional Court's practice is that in case of a dispute of constitutionality or legality of a regulation or general act based on law that has been canceled or abolished by its decision, to reject the initiative with the explanation that by canceling or abolishing the law the base for the existence of the regulation i.e. general act ceased to exist since when they are not considered to be part of the domestic legal system. But there are cases the Court to cancel or abolish such a regulation i.e. general act by a decision after it determines that it is being still applied in practice.

In difference of the legal effects of the decisions of the Constitutional Court canceling or abolishing a law, regulation or general act applicable to everyone, the effects of the Constitutional Court's decisions canceling individual final or effective act that violates certain freedom or right of a citizen is limited only to the parties in the dispute which is decided upon by the canceled act. The action of such decisions of the Constitutional Court is *inter partes*.

The Constitutional Court decisions are basically respected by the bodies, institutions and other courts. Only few cases have been noted when the body has adopted again the same act as the one that has previously been canceled by the Court's decision. Also, as a result of difference in understanding and interpretation of the legal action of the Constitutional Court decisions there were cases when their application i.e. execution has been carried out in a somewhat different manner that the one contemplated by the Constitutional Court. In recent time such was the case with the implementation of the decision of the Court canceling the Law amending the Law on labour relations, basis of which for a larger number of employees in the state administration bodies their employment ceased as well as the decision canceling part of the provisions of the Law on political parties referring to the acquiring of funds for these parties.

Concerning the issue if other courts are faced with difficulties in applying the Constitutional Court decision the Court has no official information by them which indicates that they do find their way well in this matter.

The Constitutional Court in deciding upon issues in its competence, although having in mind, is not however obliged by the interpretation of the disputed law by the Supreme Court or other courts in the Republic of Macedonia. Thus the Constitutional Court may provide for a different interpretation or understanding of such an act.

On the other side the interpretation i.e. legal understanding of the Constitutional Court on certain constitutional principles or legal rules stated in the explanation of its decisions (the Constitutional Court of the Republic of Macedonia does not adopts a special - purely interpretative decision) are legally not binding on other courts. How much in practice other courts do uphold i.e. accept its interpretations the Court has no complete information. Only in a number of cases (for example: the Supreme Court of the Republic of Macedonia) it has been noted that they in their decisions call upon the interpretations of the Constitutional Court.

Thus, as a results of being non compulsory, it is possible that some of the other courts do not uphold the interpretations of the Constitutional Court and the consequences of this remain in the sphere of provision of unity in the application of laws by the courts for which the Constitutional Court is not competent but the Supreme Court of the Republic of Macedonia is (Article 101 of the Constitution).

A logical conclusion of the stated is that the Constitutional Court is basing its assessment of constitutionality of certain law or its individual provisions (rules) always on its own interpretation and opinion so that its assessment on constitutionality refers only within determined meaning and interpretation which the Constitutional Court has assigned to that law i.e. individual provisions of it.

III. THE INTERFERENCE OF EUROPEAN COURTS

The precedent law of the European Court on Human Rights and the Court of Justice of the European Community is not compulsory for the Constitutional Court of the Republic of Macedonia.

Namely, the decisions of the European Court are compulsory only for the state and even this in respect of compensation of the party that has won the case without imposing obligation for reopening an already completed procedure in the Constitutional Court or any other court of the Republic of Macedonia.

However, the Constitutional Court of the Republic of Macedonia in an appropriate manner and within its possibilities makes the efforts to monitor this law and the procedure, opinions and positions in the decisions of these courts on certain legal institutes and issues are being used and presented as argument in clearing or further explanation i.e. interpretation of the same or similar issues that are being decided upon in this Court thus they have certain appropriate influence in the decision making.

The reply to the question may the Constitutional Court base its decision on a provision contained only in the European Convention for Protection of Human Rights and Fundamental Freedoms should be considered in respect of the sense of the principle of constitutionality and legality. In this context it is important to point out that according to the Constitution of the Republic of Macedonia the sense and meaning of the principle of constitutionality and legality the protection of which is in the competence of the Constitutional Court of the Republic of Macedonia, is among else to provide compliance of the laws with the Constitution as well as compliance of other regulations and general acts with the Constitution and the law and not with the European Convention or other international acts which have been ratified or to which the Republic of Macedonia has acceded.

Accordingly, the only frame and limits in which the Constitutional Court may move in assessing the compliance of the laws with the Constitution and the compliance of regulations and general acts with the Constitution and the laws are the Constitution and the laws of the Republic of Macedonia. Thus the Constitutional Court is normatively legally limited in its decision making on constitutionality and legality to base its decisions only on provisions contained in the European Convention. However, considering that some rights of the Convention are guaranteed by the Constitution of the Republic of Macedonia too, the Constitutional Court practice is to determine i.e. declare in the explanation of its decision that the disputed law, regulation or general act is in compliance or not besides with the Constitution or laws of the Republic of Macedonia and the Convention, too. In this way certain provision of the Convention used only as additional and stronger argument in making the decision on constitutionality i.e. legality of the act that is the object of assessment by the Court, and not as the only base or argument for the decision making. Thus in the practice of this Court there is practically no case that a law, regulation or a general act to be canceled or abolished only because it has not complied with the European Convention.

But the fact itself that the European Convention as well as other international agreements that have been ratified by the Republic of Macedonia as a composite part of the domestic legal system and that they by rank are higher and with stronger legal action from the laws is a sufficient challenge for the Constitutional Court to consider in future on criteria for assessment of constitutionality of laws, regulations and general acts where their compliance or

non-compliance with the European Convention or other international agreements concerning the field of human rights and freedoms is being considered.

This would practically mean that if at the request for an initiative where the constitutionality of a disputed law is being denied only because the violation of a certain human right or freedom provided for by an international act which has not been determined in the Constitution of the Republic of Macedonia, the Court shall determine such a violation and this being sufficient base and argument to proclaim this law as unconstitutional and to cancel or abolish it as unconstitutional or the vice versa. This because the European Convention and other international agreements from the aspect of rights guaranteed in them have the same legal effect as the Constitution considering that all rights and freedoms determined by international law according to article 8 Paragraph 1 Line 1 of the Constitution are also fundamental values of the constitutional system of the Republic of Macedonia. On the other side such an approach of the Court would be a contribution to the harmonization of the domestic law to the standards and requirements of those international acts which in fact an obligation of the state that it has undertaken with the ratification i.e. the accession to these acts.

In accordance with the rule to exhaust all legal remedies of the domestic legal system it is logical to conclude that before a charge (appeal) is submitted to the European Court of Human Rights it is compulsory to seek protection (to file a case) in the Constitutional Court of the Republic of Macedonia. This compulsory approach concerns only those freedoms and rights, protection of which in first degree is in the competence of the Constitutional Court and its decision is final (the protection of other freedoms and rights falls in the competence of other courts).

Since the Republic of Macedonia is not EU Member State, it does not fall under the jurisdiction of its law. Thus, the bodies of the Republic of Macedonia, including the Constitutional Court and other courts are not obliged to apply the law of the European Union except in cases when through the implementation in the domestic legislature it became part of our own legal system.