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# The Transformative Role of the Macedonian Constitutional Court

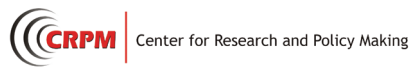
Marija Risteska  
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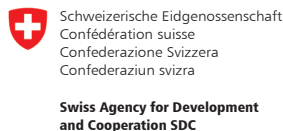
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# Abstract

The political role of the Macedonian Constitutional Court has been ignored and omitted from study by academia, as well as from commentaries and interpretations by legal professionals. The latter understand the Constitutional Court as part of the judicial system of the country and recognize its role as a legal institution which decides on matters disputed by two parties. The notion of the Constitutional Court as arbitrator and mediator remains, and the opposite notion that the Court is a truly political institution that selects among competing rules and values is typically denied or ignored at best.

This paper explores the position, jurisdiction, institutional structure, operation and jurisprudence of the Macedonian Constitutional Court as policymaker. To that extent, the paper analyses the Constitutional Court as an actor that is influenced by, but also as an actor whose decisions influence, politics and political discourse. It also assesses the “hit-and-miss” opportunities the Constitutional Court had in its contribution in the transformation of the Macedonian society into a society that adheres to and promotes democratic values and principles.

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# 1.

## Introduction

The constitutional judiciary in the Republic of Macedonia for the first time was inaugurated by the Constitution of the Socialist Republic of Macedonia in 1963 (as a federal unit of the former Yugoslavia), whereas the Constitutional Court was established and began operation in 1964. The new Yugoslav Constitution of 1974 envisaged the parallel operation of the federal Constitutional Court and Constitutional Courts (CC) in the then socialist republics constituting Yugoslavia.

With the 1991 Declaration of Independence, Macedonia adopted a new Constitution that accepts the European (continental) model of protection of constitutionality and legality through a specialised body, the Constitutional Court of the Republic of Macedonia. The Court<sup>1</sup> is thereby established as a state body and, according to its status, does not fall under the system of division of powers<sup>2</sup>. The Constitution of the country defines the Constitutional Court as a state body with a higher authority, and hence its decisions are binding on all other subjects without the right of appeal. The Court is independent from other state bodies, such as Parliament, the government, the President of the Republic and the ordinary courts. In this respect, the Constitutional Court hinges on the Constitution of the Republic of Macedonia<sup>3</sup>. Therefore, the Constitutional Court is considered to be a cornerstone of constitutional democracy, just as Parliament is the hallmark of representative democracy in Macedonia.

Enduring the traditions from Yugoslav times, the organization and internal operation of the Constitutional Court of Macedonia are defined with the Rules of Procedure and not a separate Law on the Constitutional Court. Scholars have debated on the need to replace the Rules of Procedure with a Law on the Constitutional Court. Karakamisheva elaborates that there is an obvious need to regulate the status, organization and competences of the Constitutional Court with a separate law, as 'there is practically no country in the world that has a Constitutional Court in its system that is not regulated with a law or a constitutional law.'<sup>4</sup> Spirovski opposes this standpoint, arguing that 'currently

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<sup>1</sup> If otherwise not mentioned by the Court in the respect of this paper, we mean the Constitutional Court of Republic of Macedonia.

<sup>2</sup> Tanja Karakamisheva, *Different Models for Protection of Constitutionality, Legality and Independence of Constitutional Court of the Republic of Macedonia* (Venice 2011) <[www.venice.coe.int/WCCJ/Rio/Papers/MKD\\_Karakamisheva\\_E.pdf](http://www.venice.coe.int/WCCJ/Rio/Papers/MKD_Karakamisheva_E.pdf)> accessed 7 May 2015.

<sup>3</sup> Svetomir Škarič and Gordana Davkova-Siljanovska, *Ustavno pravo* [Constitutional Law] (Kultura 2009).

<sup>4</sup> Karakamisheva (n 2).



the strongest guarantee of the independence of the Constitutional Court of the Republic of Macedonia as an institution is its regulatory autonomy' (not being dependent on a Parliamentary act that decides on the status and organization of the court), although he concurs that 'the nature of the legal effect of repealing and annulling decisions or the right to submit initiatives to the Court require to be regulated by a law.'<sup>5</sup> The debate has so far resulted with no adoption of a separate Parliamentary act that regulates the status, organization and competences of the Constitutional Court, despite the initiatives to amend the Constitution in order to allow for an adoption of such law in 2005<sup>6</sup> and 2014<sup>7</sup>. The Venice Commission finds this situation to be 'quite irregular and that it would be useful to adopt a separate law on the Constitutional Court for the purpose of filling the gap in the existing text and to provide a proper legal basis for the Court's operation, as well as complying with the European standards in the field of constitutional justice. In the opinion of the Commission, that would regulate issues relating to the status of its judges, basic conditions for the institution of proceedings before the CC, legal effects of the CC's judgments, etc.'<sup>8</sup>

## 1.1. Organization of the Constitutional Court

The Constitution defines in a separate chapter (Chapter IV) the position of the Constitutional Court, its composition, competence, functions and immunity of the judges, as well as the legal effect of its decisions.

The Court is composed of nine judges. The judges of the Constitutional Court are elected from the ranks of outstanding members of the legal profession. The candidates for Justices are nominated by the three tiers of government: (i) the President of the Republic proposes two judges; (ii) the Judicial Council proposes another two, whereas the remaining five judges are proposed by (iii) the Parliament's Committee on Election and Appointments. The Assembly (the

<sup>5</sup> Igor Spirovski, *The Independence of the Constitutional Court of the Republic of Macedonia: Guarantees and Challenges* (Venice 2011) <[www.venice.coe.int/WCCJ/Rio/Papers/MKD\\_Spirovski\\_E.pdf](http://www.venice.coe.int/WCCJ/Rio/Papers/MKD_Spirovski_E.pdf)> accessed 26 January 2016.

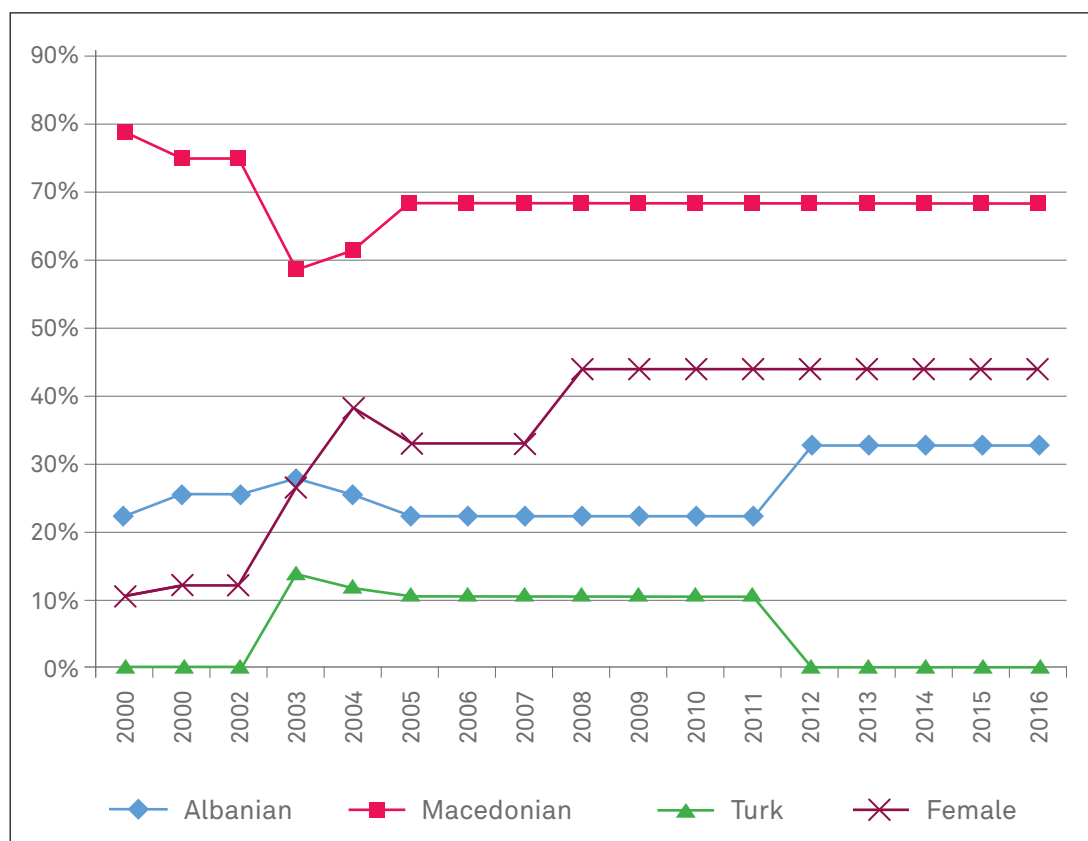
<sup>6</sup> The Government proposed in 2005 the Draft Constitutional Amendment XXXIV, which provided that the types of decisions of the Constitutional Court, their legal effect and enforcement are to be regulated by law, while the internal organization of the Court is to be regulated by the Court itself.

<sup>7</sup> The Government proposed in 2014 the Draft Amendment XXXIX that broadens the jurisdiction of the Constitutional Court (CC) to examine complaints from individuals about violations of their human rights (hereinafter – 'constitutional complaints') which opened the debate on the need of a Law on Constitutional Court.

<sup>8</sup> European Commission for Democracy through Law (Venice Commission), 'Opinion on the Seven Amendments to the Constitution of "The former Yugoslav Republic of Macedonia" Concerning in Particular the Judicial Council, the Competences of the Constitutional Court and Special Financial Zones' CDL-AD(2014)026, 13 October 2014 <[www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282014%29026-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282014%29026-e)> accessed 4 February 2016.

Macedonian Sobranie) elects six judges with majority votes of the total number of Representatives (Art. 104 of the Constitution of Macedonia), and three of the members are elected by a majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives who belong to communities not in the majority in the population of Macedonia (Amendment XIV of the Constitution of Macedonia). Therefore the Court has been served by Justices from Macedonian, Albanian and Turkish ethnic background, reflecting the country's multiethnic character (see Figure 1). Since 2000 the gender structure of the judges of the Court increasingly reflects the gender balance of the country with 44% (up from 11% in the year 2000) of the Court's judges in 2004 being female (see Figure 1, purple X line).

Figure 1. The ethnic and gender structure of Judges in the Constitutional Court of the Republic of Macedonia (2002-2016)



Source: Annual Reports and Decisions of the Constitutional Court  
 Available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>

The very fact that it divides the Court from the rest of the state bodies to which it refers in Chapter III, Organization of power, shows that the Constitution envisages the Court's independence. However, this is an indirect guarantee of independence, whereas the Constitution provisions several direct guarantees. Spirovski considers the term in office of the Justices as the strongest direct

guarantee of independence. The Justices are elected for a term of nine years (Art. 109) without having the right to be re-elected. The term in office is the longest of any appointed official in the Macedonian system and ensures independence from politics as it is more than two times longer than the term of the body that elects Justices (the Assembly). This provision further enhances the Court's independence by not allowing re-election of Justices (Art. 109), which nullifies the incentive of softening their approach towards the political branch in order to ease their way to re-election. At the same time, the Constitutional Court Justices have immunity and the right to continue receiving salary for one year after the expiry of their term in the event of the practical impossibility of Justices resuming former jobs or ensuring other appropriate appointment. This in effect enforces the Justice's independence. The provisions of incompatibility of the Justice's office of the Constitutional Court with performing another public function, profession or membership in a political party, together with the provision of voting in absence of the public, safeguards the individual Justices' independence.

According to Article 113 of the Constitution, the manner of work and the procedure before the Constitutional Court is determined by the Rules of Procedure of the Constitutional Court<sup>9</sup>. Hence, this act of the Court regulates the overall procedure of decision-making, starting with the conditions for submitting an initiative or a motion, their form, the deliberation, up to making the decision public. It also defines the internal organization and the organization of the professional staff, the status of the advisers and their appointment by the Court. The Rules of Procedure of the Court were adopted in 1992 and have not been amended since.

## 1.2. The Competences of the Constitutional Court

Separate from the ordinary judiciary, the Constitutional Court in the Republic of Macedonia stands out in the way it supports the system from within, safeguarding the values of constitutionalism through the use of checks and by means of the right of individual appeal for human rights protection. The Court is a guarantor of the Constitution and one of the key actors ensuring compliance with the norms and values enshrined in the constitutional text.

The jurisdiction of the Constitutional Court is directly established by the Constitution of Republic of Macedonia. The Court competences can be broken down in three main groups: (i) a posteriori review, (ii) protection of human rights and freedoms, and (iii) other powers. Considering that the Constitutional Court has a broad range of powers, in practice this leads to a relatively high number of cases that are submitted to the Court.

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<sup>9</sup> Constitutional Court of the Republic of Macedonia, 'Rules of Procedure of the Court' (*Constitutional Court of the Republic of Macedonia*, 1992) <[www.ustavensud.mk/domino/WEBSUD.nsf](http://www.ustavensud.mk/domino/WEBSUD.nsf)> accessed 2 February 2016.

### 1.2.1. A Posteriori Review

According to Article 108 of the Macedonian Constitution, the Constitutional Court of the Republic of Macedonia is a body of the Republic protecting constitutionality and legality. This sets judicial review in the core tasks of the Court as the Constitution empowers the Court to apply a posteriori review of conformity of laws, collective agreements and other regulations with the Constitution (Art. 110). This review is abstract because the dispute before the Constitutional Court is guided between general legal norms – the law or any other legal act and the Constitution. The petition for the review may be submitted by anyone (*actio popularis*), i.e., every citizen and any legal person. Submission of initiatives is not connected with the existence of legal interest by the person who submits it. The procedure for evaluation of constitutionality and legality may be commenced by the Court on its own initiative, either within the framework of the existing initiative or originally launched by itself. According to the Rules of Procedure of the Court (Art. 15),<sup>10</sup> the initiative for review of the constitutionality and legality of a legal act should follow a certain form and content, i.e., to identify the act that is being challenged, the reasons for challenging the act, constitutional or legal provisions that are violated with the challenged act, as well as clearly stating the initiator.

The Court debates in substance and decides on initiatives in case the challenged act is a general one and if it is still in force. If there are grounds for doubts, the Court first commences a procedure and in the second phase cassates (annuls or repeals) it. The court's decisions can abrogate (*ex nunc*) or annul (*ex tunc*) laws. With the decision to abrogate, the law or other regulations or other general legal act shall cease to apply from the moment of publication of the decision of the Constitutional Court in the 'Official Gazette'. On the other hand, with the decision to annul, the Constitutional Court nullifies, not only the act, but also all the consequences caused by its practical application until the moment of the decision. This means that the abrogation does not have a retroactive effect, but the annulment does as it cancels the effects. In this regard, the Court's decisions are final because they cannot be appealed.

### 1.2.2. Protection of Human Rights and Freedoms

The Constitutional Court is also trusted to secure the enjoyment of human rights through the observance of the Constitution. However, the Constitution of Macedonia in Article 110 specifically regulates one of the competences of the Constitutional Court to be protection of freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity, as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation. Treneska argues that some

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<sup>10</sup> Ibid Section 3, Art. 15.

antecedents of the jurisdiction of the Constitutional Court in Macedonia to protect fundamental rights could be found in the Yugoslav Federal Constitution from 1963. It empowered the Constitutional Court to decide on the protection of self-government rights and other fundamental freedoms and rights specified by the Federal and member state constitutions where rights were violated by an individual act or deed by the state, communal body or company, or where the rights were not guaranteed by other judicial protection by statute<sup>11</sup>. This instrument had no result in practice. The Constitutional Court rejected individual suits on the basis of an absence of power and directed the plaintiff to the ordinary courts<sup>12</sup>.

From Article 110 of the Constitution of Republic of Macedonia, one can notice that the Constitution offers protection through the Court for three<sup>13</sup> of the 24 basic human rights regulated in Chapter II. All three are political human rights and none of the 17 economic, social and cultural rights are included. Therefore, observers, analysts and scholars have concluded that this competence of the Constitutional Court 'is restrictive and narrow'.<sup>14</sup> Although legal scholars have unanimously argued for the extension of the protection of human rights by the Constitutional Court to all human rights protected by the Constitution,<sup>15</sup> this has not yet materialized as it is related to the introduction of constitutional complaint, which in turn is directly associated with the overall debate on the need for an adoption of a Law on the Constitutional Court. As noted by the Venice Commission, 'if the (constitutional complaint) new remedy against human rights violations is introduced at the national level, there is a real risk of a strong growth in the number of cases the Court has to examine which will entail careful preparation encompassed of: adoption of procedural rules, development of new working methods, hiring and training law clerks and secretarial assistants, and

<sup>11</sup> Renata Treneska, *The Constitutional Court of the Republic of Macedonia: Proposals for Legislative and Administrative Reform* (Central European University, Center for Policy Studies 2003) 21-22 <[www.policy.hu/document/200808/treneska.pdf&letoltes=1](http://www.policy.hu/document/200808/treneska.pdf&letoltes=1)> accessed 4 February 2016.

<sup>12</sup> Ibid 23.

<sup>13</sup> The Constitution of RM determines that Constitutional Court protects the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation (Art. 110, para. 1, subpara. 3)

<sup>14</sup> Margarita Caca Nikolovska, 'Analysis of the Independence of the Judiciary in Republic of Macedonia: Perceptions, Differences and Challenges' (Institute for Human Rights 2013).

<sup>15</sup> See the works of Savo Klimovski, Svetomir Škarič, Vladimir Mitkov, Vesela Mukoska – Chingo, Renata Treneska Deskoska, Tanja Karakamisheva, Cvetan Cvetkovski and Arsov Jordan as cited in 'Ulogata na ustavniot sud na Republika Makedonija vo zaštita na slobodata i pravata na čovekot i graganin ot povredeni so poedinečen akt ili dejstvo' [The Role of the Constitutional Court of the Republic of Macedonia in the Protection of Human Rights and Freedoms of with a Legal Act or Action] (2011) 3 Praven dijalog <[www.ihr.org.mk/mk/praven-dijalog/praven-dijalog-br3/133-uloga-na-ustavniot-sud-na-rm.html](http://www.ihr.org.mk/mk/praven-dijalog/praven-dijalog-br3/133-uloga-na-ustavniot-sud-na-rm.html)> accessed 4 February 2016.

etc.<sup>16</sup> all of which is pertinent to the special law on the Court, as currently the competences and procedures of the Court are regulated solely by its Rules of Procedure. In 2014, the Government of Macedonia proposed a Draft Amendment XXXIX to the Constitution that broadens the jurisdiction of the Constitutional Court to examine complaints from individuals about violations of their human rights. The list of rights is substantially expanded, albeit it remains a closed list, not incorporating for example the right to strike or the right to vote. The Amendment is still in consultation and has not been adopted.

What regards the procedure for the protection of human rights and freedoms has been laid down in the Rules of Procedure of the Court (Chapter IV, Art. 51-57). As in the case of judicial review of constitutionality and legality of a legal act, the procedure for the protection of human rights and freedoms can be appraised by anyone considering that an individual act or action has infringed his/her right or freedom within two months from the day of delivery of the final or legally enforced individual act, namely from the date on which he/she became aware of the activity undertaken creating such an infringement, but not later than five years from the day of the undertaking (Art. 51 of Rules of Procedure). Hence, the biggest weakness of the competence of the Constitutional Court is its very limited scope of rights, which are protected. Additionally, the deadline of five years is interpreted by Trajkovska-Hristovska as a response to the fear of the Court from increased workload.<sup>17</sup> For the protection of freedoms and rights, the Constitutional Court decides on a public hearing. With the decision for protection of freedoms and rights, the Constitutional Court defines whether there is an infringement and, depending on that, annuls the individual act, prohibits the action causing the infringement or refuses the request (Art. 56 of the Rules of Procedure). This makes the 'constitutional complaint rather effective means of protection of human rights'.<sup>18</sup> The Court's decision on protection of freedoms and rights, violated by individual act or action, determines whether there is a violation of freedoms and rights and, dependent on this, the Court might annul the individual act, forbid the action or deny the request. The effect of the decision is *inter partes*, and in the decision, the court determines how to eliminate the consequences that emerged by the application of the individual acts.

### 1.2.3. Other Powers

The Constitutional Court of the Republic of Macedonia also decides on positive or negative conflicts of competency among holders of legislative, executive and judicial offices, as well as conflicts of competency among national level bodies

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<sup>16</sup> European Commission for Democracy through Law (Venice Commission) (n 8).

<sup>17</sup> Ibid.

<sup>18</sup> Spirovski (n 5).

and sub-national units of local self-government<sup>19</sup>. A proposal for the resolution of the conflict of competency among holders of legislative, executive and judicial offices may be submitted by any institution that is in such conflict or anyone that has been denied a certain right due to claims of the institution for non-competency to resolve that issue/realize that right. The procedure for competence collision settlement is regulated by the Rules of Procedure of the Constitutional court (Chapter VI, Art. 62-66).

It also decides on the accountability of the President of the Republic in case of violation of the Constitution and laws in exercising his/her rights and duties. The Assembly enacts the proposal for commencing the procedure by a two-thirds majority vote of the representatives. Provided that the Constitutional Court by a majority of votes of the judges considers the President accountable, the Office of the President is ceased by the force of the Constitution (Rules of Procedure of the Constitutional Court, Chapter V, Art. 58-61).

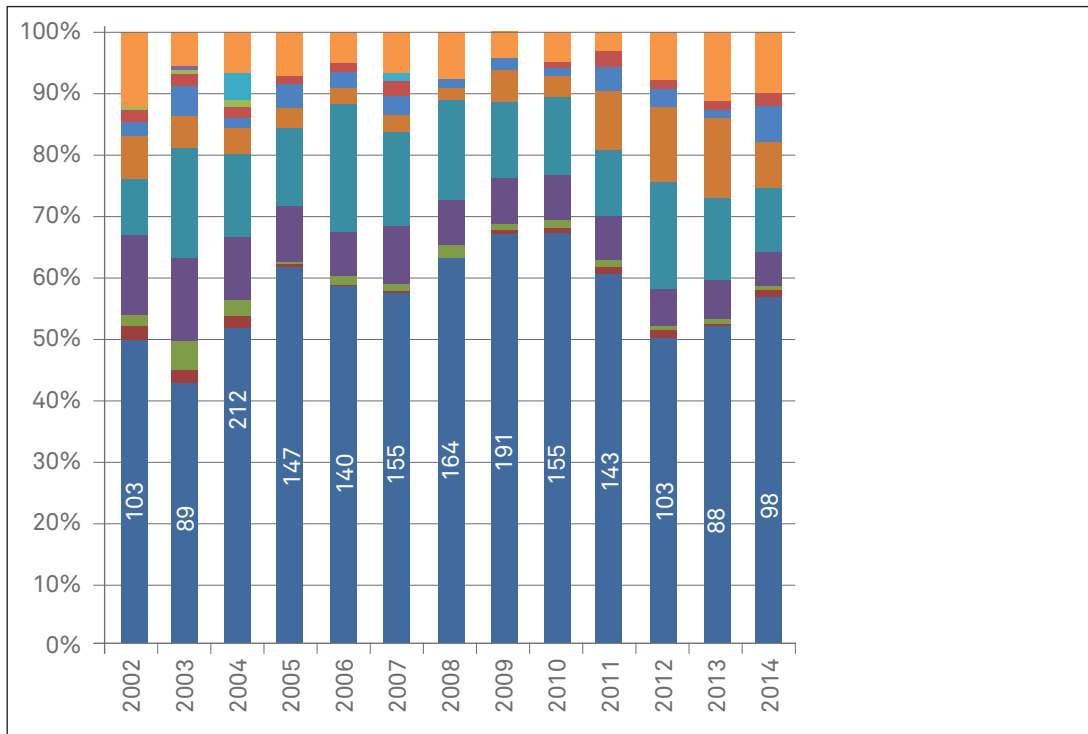
### 1.3. Trends

Comparatively speaking, the trends differ. Looking at the received cases (see Figure 2 and Figure 3), according to the type of disputed act, one sees that clearly disputed laws take up the majority of cases and on average represent about 50% of disputed acts each year. Looking at all disputed acts throughout the period 2002-2014, one sees that the majority represent disputed laws (57%), acts of the units of local government (14%) and Regulations by the Government of Macedonia (hereinafter GoM) and ministries (9%). An insignificant number of disputed acts (lower than 1%) relate to acts of political parties, the President of the Republic of Macedonia and municipal statutes.

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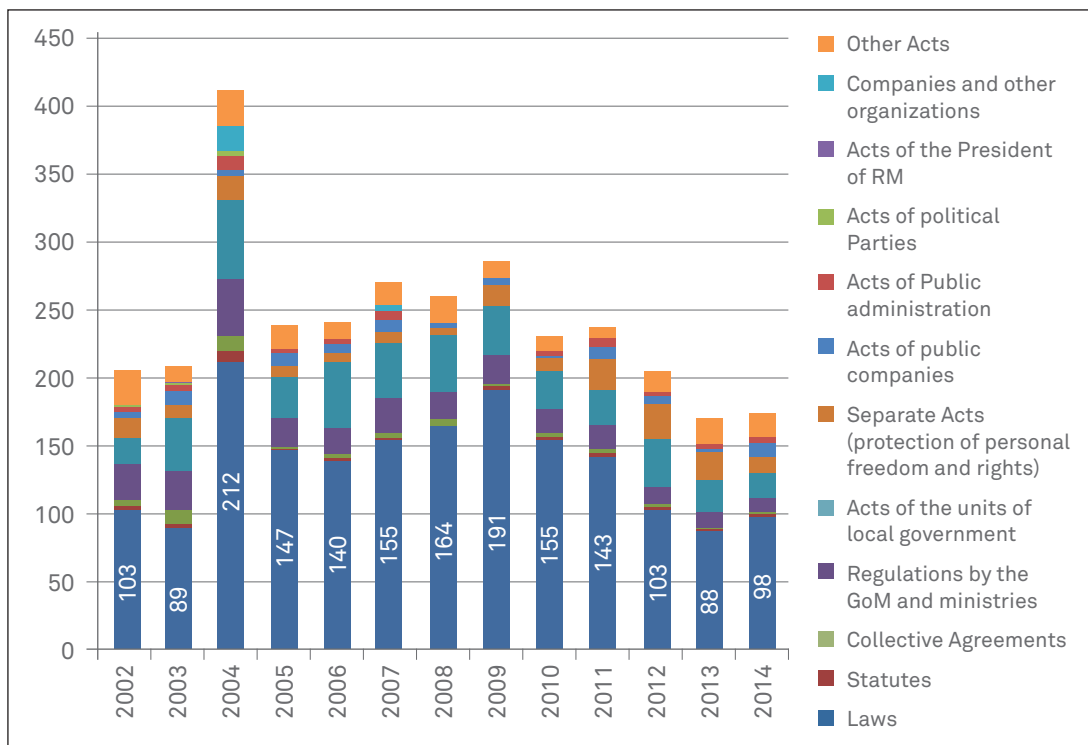
<sup>19</sup> The conflict of competences can be positive when two or more institutions claim that they have competence on certain issue, or negative when no institution claims to have competence on certain issue. See Savo Klimovski, *Ustavno pravo i politički sistemi* [Constitutional Law and Political Systems] (Prosvetno delo 2006).

Figure 2. Received cases according to the type of the Disputed Act



Source: Annual reports and decisions of the Constitutional Court.  
 Available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>

Figure 3. Received cases according to the type of the Disputed Act



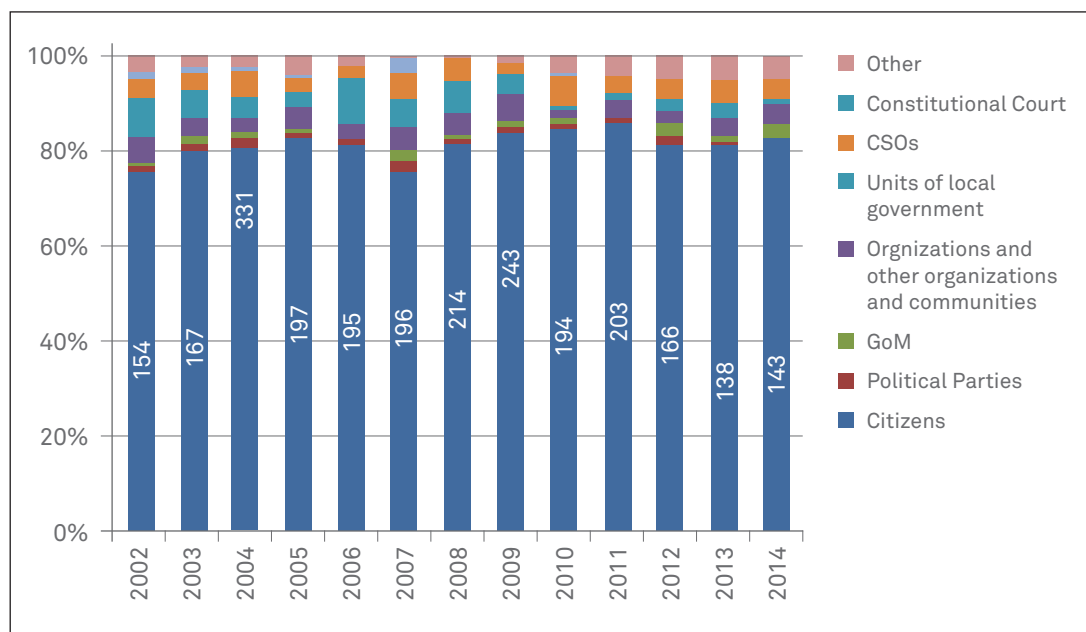
Source: Annual reports and decisions of the Constitutional Court.  
 Available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>



In order to better understand the activity of the court, it helps to quantitatively dissect the structure of the petitions as well as the stakeholders involved.

The largest number of petitions were submitted in 2009 (412), whereas in 2013 and 2014 the Constitutional Court experienced the lowest numbers of submitted petitions since 2002, or 170 and 173 petitions respectively (see Figure 4). The majority of all petitions (2002 – 2014) have been submitted by citizens and have averaged at around 80% of all petitions each year. What is obvious from this perspective is the relatively low activity of three important policy actors, first and foremost the Constitutional Court, followed by GoM and the political parties. From 2002 they were responsible for submitting 17, 33 and 39 petitions respectively. It has to be noted that this might be the case due to the fact that many choose to submit petitions as citizens even though, for example, they belong to a certain political party or a CSO which might skew the data towards citizen representation.

Figure 4. Structure of the submitted petitions in the Constitutional Court (2002-2014) by number and entity



Source: Annual Reports of the Constitutional Court of Macedonia.  
Available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>

## 2.

# The Constitutional Court as Actor in the Policymaking Process

Judicial policymaking has been defined in various ways. Grossman and Tanenhaus define judicial decisions as a crucial catalyst directing social change, 'as men have articulated means and ends of their common existence through law.'<sup>20</sup> Moreover, 'most what courts do is not political, but what most Constitutional courts do is political, as they select from among competing rules, interpret new ones, or act in absence of clearly articulated executive, legislative or constitutional norms.'<sup>21</sup> They are policymakers even when they make a decision not to decide or to support the status quo.

The policymaking role of courts in transition countries has been seen by Ackerman and Teitel as a cornerstone of transitioning democracy,<sup>22</sup> especially due to its power to 'limit misuse of power and distortion of democracy by the political elites'<sup>23</sup> and for protecting basic human rights<sup>24</sup>. Considering the 'general distrust of legislatures, administrations and regular courts, the constitutional courts could ... perform the role of a true vanguard in reconstructing the axiology of the legal system.'<sup>25</sup> In this respect, it is expected from constitutional courts that they become activists. Their judicial activism, though, depends on how broad the competences of the court are, whether they have space to only react in the political process or can adopt an ambitious activist agenda by developing new concepts and doctrines and give novel interpretation to established legal standards.

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<sup>20</sup> Joel B. Grossman and Joseph Tanenhaus, *Frontiers of Judicial Research* (Wiley 1969) 406 cited in May Volcansek (ed), *Judicial Politics and Policy Making in Western Europe* (Frank Cass 1992).

<sup>21</sup> May Volcansek (ed), *Judicial Politics and Policy Making in Western Europe* (Frank Cass 1992).

<sup>22</sup> Ruti Teitel 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 Yale.

<sup>23</sup> See Kim Lane Scheppele, 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)' in Wojciech Sadurski, Martin Krygier and Adam Czarnota (eds), *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses* (Central European University Press 2005).

<sup>24</sup> See Bojan Bugarcic, 'Courts as Policy-Makers: Lessons from Transition' (2001) 42 Harvard International Law Journal 247.

<sup>25</sup> Wojciech Sadurski, 'Judicial Review in Central and Eastern Europe: Rationales or Rationalizations' (2010) *Hebrew University International Law Research Paper No. 07-10* <<http://ssrn.com/abstract=1545271>> accessed 4 February 2016.

The Macedonian Constitutional Court is part of the democratic political system of the country established in 1991. However there is not much of a scholarly discussion in Macedonia on the topic of the Court's role in the country's transition to democracy. This paper plans to change this predicament by providing arguments and discussion on the policymaking role of the Court, its potential to promote democracy and emerge as a symbol of a new democratic order. To this end, the authors are working on the following research questions: What is the role and position of the Macedonian Constitutional Court in democratic processes? Is the Constitutional Court an activist in the new democracy? Does the Court have a positive influence in the transition to democracy? What are the key factors of judicial activism in the Macedonian transition? What are the strategies for judicial activism the Court has adopted? Has the Court facilitated social change or not?

The paper is qualitative in nature and based on primary and secondary sources. The primary sources include 15 semi-structured interviews with former Justices, current legal clerks, legal professionals, journalists, political party representatives and constitutional law scholars. It also encompasses analysis of case statistics and case-content analysis. The secondary sources include scholarly papers, annual reports of the court, as well as media analysis. The paper covers the period from 2001 until today. The reason for this is the lack of data on the period from independence to 2001. As the activity of the court is also reviewed through its annual reports, we note that reports prior to 2001 are not made publicly available. At the same time, 2001 is an important year for Macedonia as after the inter-ethnic conflict in the same year, Macedonia adjusted its government structure and modes of governance in order, not only to allow for more adequate participation of minority groups in policy and decision-making, but also to strengthen their representation in politics and public administration. Most of these policy solutions were envisaged under the Ohrid Framework Agreement (OFA). The cases that are analysed are chosen using four methods: (i) the 'most difficult case' design<sup>26</sup> (that operates under the assumption that constitutional courts have made a positive contribution to political and social change and overall transition to democracy through cases that are 'the most challenging and least favorable to it'<sup>27</sup>); (ii) how important the case was for transition to democracy (dealing broadly with power-sharing, ethnic/minority rights, federalism/organization of government, or issues pertaining to division of powers); (iii) how popular the case was, meaning whether it stirred discussion in the public; and (iv) if the case was recognized by the interviewed justices, professors and/or legal professionals as a leading case that has impact on societal transformation.

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<sup>26</sup> Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 145-148.

<sup>27</sup> *Ibid* 148.

## 2.1. The Constitutional Court as Negative Legislator

When Hans Kelsen famously described constitutional courts as ‘negative legislators’, he was referring to their power to annul acts of the legislature<sup>28</sup>. In this regard, after arguing that ‘to annul a statute is to establish a general norm, because the annulment of a statute has the same general character of its adoption’, and after considering that to annul a statute is ‘the same as to adopt it but with a negative sign, and consequently in itself, a legislative function’, Kelsen considered that the court that has the power to annul statutes and is, consequently, ‘an organ of the Legislative branch.’<sup>29</sup> Hence, eventually the judicial review of laws performed by the constitutional courts is contributing to putting an end to the principle of Parliament’s sovereignty. However, Stone Sweet disputes this, as ‘when the court annuls a bill on rights grounds, it substitutes its own reading of rights and its own policy goals, for those of the parliamentary majority.’<sup>30</sup> This applies to the annulments not only based on rights but also based on inconsistency with the Constitution or the constitutional principles of social justice, rule of law, equality and equity.

The Macedonian Constitutional Court within its competence to a posteriori review the constitutionality and legality of legal acts has the potential to have a role of negative legislator. Hence, the review of historical data on cases the Constitutional Court of Macedonia has decided shows that the Court has rarely used this opportunity. Namely, as Figure 5 shows, in most cases (41% of all decisions) since independence, the Macedonian Constitutional Court was self-restraining and opted to either not initiate proceedings or to reject an initiative as ambiguous or inadmissible (35% of all decisions). Although, as shown in the figure above, this is a decreasing trend, it should be taken in consideration in line with the decreased overall activity of the Court in the past couple of years, as shown in Figure 4.

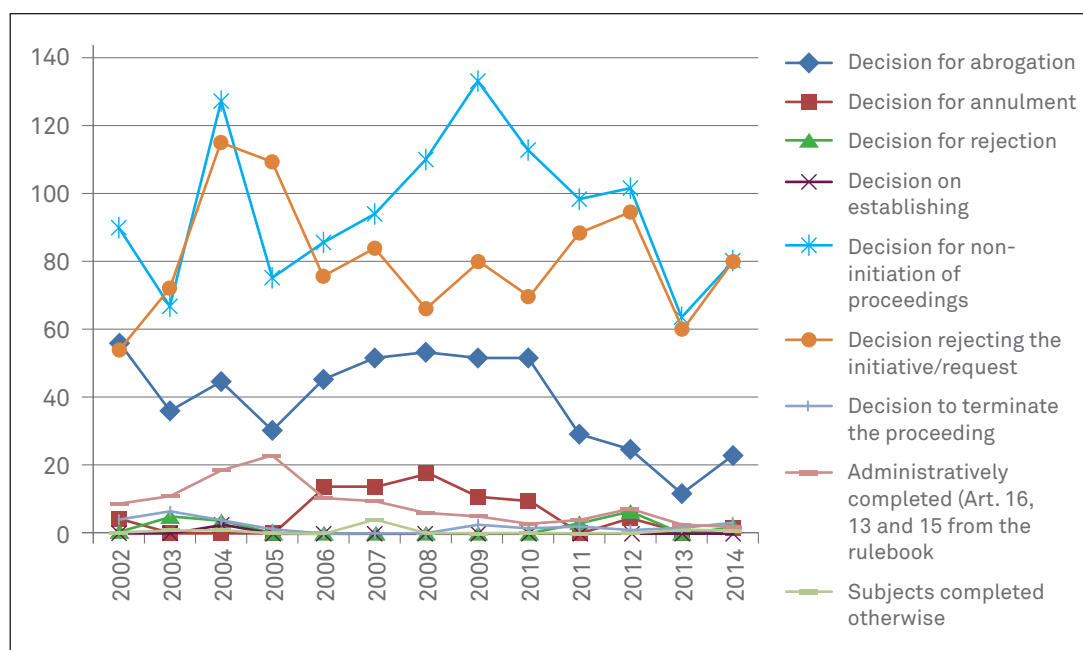
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<sup>28</sup> Hans Kelsen, ‘Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitutions’ (1942) 4 *Journal of Politics* 183.

<sup>29</sup> Hans Kelsen, *La garantía jurisdiccional de la Constitución (La Justicia Constitucional)* (Universidad Nacional Autónoma de México 2001) 54 <<http://archivos.juridicas.unam.mx/www/bjv/libros/1/31/tc.pdf>> accessed 5 May 2016.

<sup>30</sup> Alec Stone Sweet, *Governing with Judges* (Oxford University Press 2000).

Figure 5. Structure of the submitted petitions in the Constitutional Court (2002-2014) by number and type of decision.

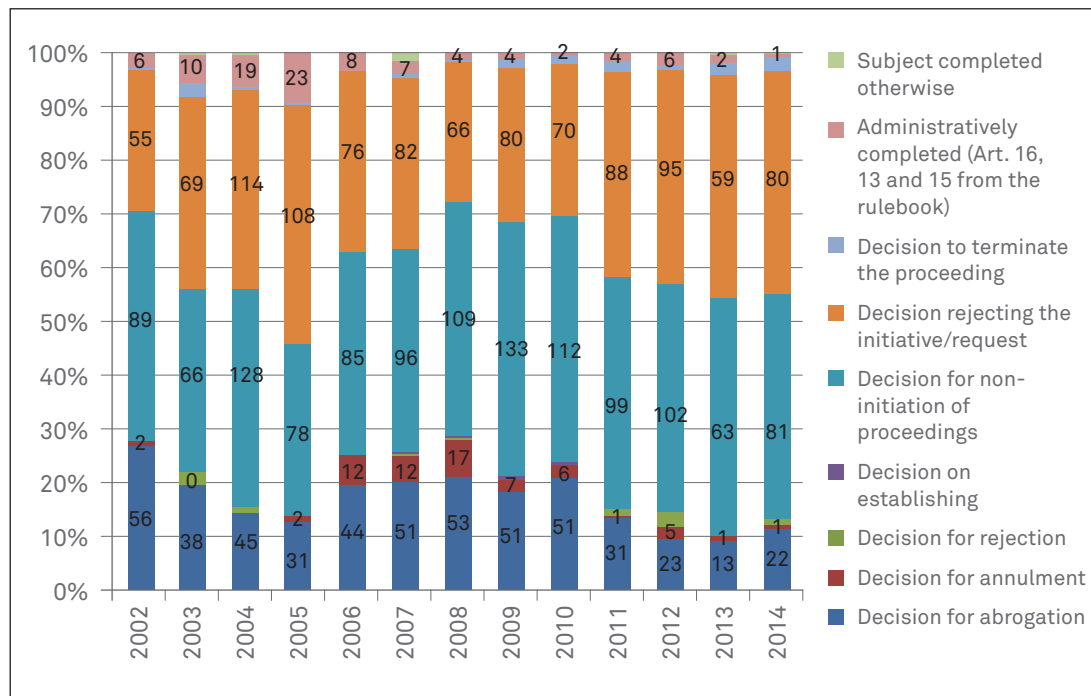


Source: Annual Reports of the Constitutional Court of Macedonia.  
 Available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>

What is more, the figures concerning the results of the judicial review activities of the Court (as presented in Figure 6) show that the negative legislator role has been played in less than one-fifth of the cases as decisions for abrogation represented 18%. The court has maintained its self-restraint by non-initiating proceedings (56%) and deciding to reject initiatives as inadmissible (22%). The historical review of data on judicial review also shows that in the period 2008 – 2014 the Constitutional Court of Macedonia has been the least active negative legislator. Namely, in this period, decisions for abrogation (see Figure 7) concerning laws have decreased dramatically (-69%), while non-initiation of proceedings (-17%) and decisions for rejection of initiative (-11%) have remained more or less the same. However, as observed in Figure 6, the Constitutional Court has been the most active as a negative legislator in the period 2007 – 2008 when the Court made the decision to abrogate or annul laws or parts of laws in 63 and 70 cases respectively. The interviewees identified one reason for this sudden increase of decisions to abrogate or annul laws – the change of government (the new one assumed power in 2006) and resulting changes in the governing style. In the period 2007 – 2008, the Court had a tendency to ally with the parliamentary opposition, argued some interviewees, whereas others pointed out that in 2006 the government instead of laws started using many other instruments to make policies: information, subsidies, taxes and methodologies which were novel and

‘some of them even regarded as not in line with the legal system of the country.’<sup>31</sup> Thus, the Court had little choice but to protect the legality and constitutionality of the system. With its decisions in the mentioned period, the Court influenced the government to change the Law on the organization of government and regulate the new policy instruments that were not recognized in the legal system (such as, for example, methodologies for impact assessment and similar instruments).

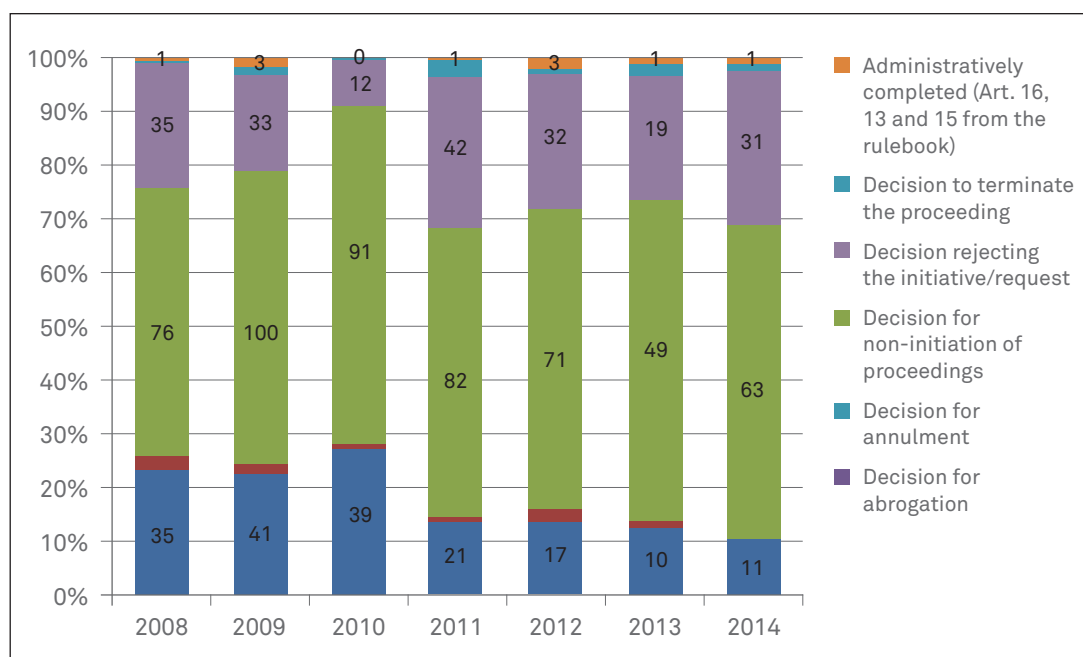
Figure 6. Structure of the decisions (%) by the Constitutional Court (2002-2014) by number and type of decision.



Source: Annual Reports of the Constitutional Court of Macedonia.  
Available at: <http://www.ustavensud.mk/domino/WEBSUD.nsf>

<sup>31</sup> Interview with Stamen Filipov, retired lawyer, legal advocate and frequent petitioner to the Constitutional Court of the Republic of Macedonia (Skopje, 5 May 2015); transcripts on file with the authors.

Figure 7. Structure of the decisions (%) by the Constitutional Court (2008-2014) by number and type of decision, specifically where Laws were disputed.



Source: Annual Reports of the Constitutional Court of Macedonia. Available at: <http://www.ustavensud.mk/dom>

When it comes to the judicial review of laws, the biggest number of laws reviewed in 2007 and 2008 were in the area of organization and work of state bodies, finances and taxes, and urban planning. All areas are very much related to the new government's program, such as the introduction of flat taxes, the substitution of sectors (i.e., export-oriented textile with domestic-oriented construction due to the financial crisis for which new urban development was needed) and the commencement of certain nation-branding projects. The review of decisions made by the Court in this period shows rigidity in the interpretation of the law, efforts to protect the legal traditions and formalism rather than openness in the assessment of legality and constitutionality. The following case is the best illustrative example for the latter.

A lawyer from Skopje challenged the constitutionality and legality of Articles 29 of the Rulebook for issuing a document cash register receipt for cancelled transactions and for the functional and technical characteristics that fiscal cash registers and the integral automatic management system should possess; also challenged were Articles 1 – 6 of the Rulebook for changing and supplementing the Rulebook for issuing a document cash register receipt for cancelled transactions and for the functional and technical characteristics that fiscal cash registers and the integral automatic management system should possess. Namely, the requirement for the cash register receipt to have a fiscal logo formed with the symbols of a sun and the messages 'BUY MACEDONIAN PRODUCTS', 'FOR OUR WELL-BEING', 'MADE IN MACEDONIA', together with the requirement

for presenting the turnover of Macedonian products on fiscal receipts, along with the logo 'BUY MACEDONIAN PRODUCTS', was contested to have violated the principles of equality and freedom in the market. The Court repealed the contested articles with the decision U. no. 134/2008, arguing that this is a state measure encouraging the purchase of domestic products and discouraging the turnover of foreign products. 'This stimulating measure, which is determined by the state, brings about violation of the principle of the freedom on the market and ... contrary to Article 55 of the Constitution the same does not provide for an equal position of the subjects on the market ... irrespective of the origin of the goods being put into circulation.'<sup>32</sup> The Court's view was that the Rulebook was promoting favouritism of Macedonian products at the expense of the other products on the market, which discourages the turnover of foreign products, 'thus violating the principle of equality of the subjects on the market, which is in contradiction with one of the fundamental values of the constitutional order envisaged in Article 8 paragraph 1 line 7.'<sup>33</sup> The decision of the Court was in line with the parliamentary opposition that accused the government of creating a financial burden on trade companies with the repealed rules, as fiscal cash registers were supposed to be changed in order to comply with the rule for issuing 'patriotic' cash register receipts. In the aftermath of the Constitutional Court's decision, the opposition party SDSM even initiated a procedure for interpellation of finance minister Slavevski for adopting this unconstitutional Rulebook. The minister argued that the final decision of adoption was made by the Parliament, and hence, he should not be held accountable for the adoption of the Rulebook. Although the decision of the Constitutional Court was made effective, it did not have long-term influence on policy. As the financial crisis in Europe deepened and widened, many other countries, i.e., Ireland, Bulgaria, Slovenia, Croatia, etc., adopted similar measures to promote purchase of domestically produced products and thereby support the local economy. With that, the opposition to the so-called 'patriotic cash register receipts' decreased and an enduring environment for re-adoption of the same policy measure was created in 2014.

One of the most controversial cases in the history of independence of the country and thus in the work of the Constitutional Court is the judicial review of the law on determining a criterion for limiting the exercise of public office, access to documents and publishing, co-operation with the bodies of state security (hereinafter the *Lustration Law*). Adopted in 2008, the Law was expected to allow the completion of the country's transition to democracy, although the Venice Commission considered adopting such a law a long time after the beginning of

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<sup>32</sup> CC decision number U. no. 134/2008, 17 December 2008.

<sup>33</sup> Ibid.



democratization to be risky<sup>34</sup>. Therefore, the consensual adoption between parties on both ends of the political spectrum was crucial for the lustration process not to be interpreted as 'a vehicle to deal with political opponents.'<sup>35</sup>

## Lustration Law

The Law was contested before the Constitutional Court by three individuals and the Open Society Foundation in Macedonia. In this case, the Court invited the Parliament of Macedonia to submit justification on three aspects of the Law: a) its temporal scope of application; b) its personal scope of application; and c) the publication of the names of persons considered to have collaborated with the totalitarian regime. In addition, the Court consulted with the Venice Commission to provide opinion on the Law. Based on these documents, the Constitutional Court evaluated the law and has decided in two instances, in 2010 and 2012, to repeal 4 articles (in 2010) and 11 articles (in 2012) of the Law.

On the first matter, the Court decided that the time frame in which the Lustration Law is implemented, i.e., for the period after 1991, was inconsistent with the Constitution<sup>36</sup>. Namely, the argument the Constitutional Court used was that the Lustration Law coverage for the period after 1991 represents a denial of the values and institutions established with the Constitution of 1991 which leads to a violation of the principle of the rule of law as a fundamental value of the Macedonian Constitution and a democratic system built upon the separation of powers and guarantees and mechanisms to protect human rights and freedoms<sup>37</sup>. This decision of the Court is rather straightforward and characterizes the role of the Court as a formalist defender of the Constitution. The Parliament, on the other hand, in its justification of the Law, argued that the laws that lay down the democratic system and especially provide mechanisms and guarantees for the protection of human rights and freedoms (such as the Law on courts, etc.) were adopted later than the Constitution, and that should extend the temporal scope of the application of the Lustration Law. This has not empowered the Justices in the Constitutional Court to more extensively evaluate the time when the country met the criteria for building a democratic society, whether at the time when the Constitution was adopted or at the time when the overall political and legal institutional framework was set.

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<sup>34</sup> Venice Commission, 'Amicus Curiae Brief on the Law on Determining a Criterion for Limiting the Exercise of Public Office, Access to Documents and Publishing, the Co-operation with the Bodies of the State Security ('Lustration Law') of "the former Yugoslav Republic of Macedonia" adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012) <[www.venice.coe.int/Newsletter/NEWSLETTER\\_2013\\_01/3\\_MAC\\_EN.html](http://www.venice.coe.int/Newsletter/NEWSLETTER_2013_01/3_MAC_EN.html)> accessed 10 May 2015.

<sup>35</sup> Natalia Letki, 'The Consequences of Lustration for Democratization: The Experience of East Central Europe' in M. Hatschikjan and C. Noack-Aetopoulos (eds.), *Past and Present: Consequences for Democratisation* (Center for Democracy and Reconciliation in Southeast Europe 2004) 5.

<sup>36</sup> CC decision U. no. 42/2008 and U. no. 77/2008, 24 March 2010.

<sup>37</sup> Ibid.

In further judgements on the same law, both in 2010 and in 2012, the Court argued ‘that the Lustration Law places the citizens covered by this process, in an unequal position.’<sup>38</sup> Thus, in 2010 the Constitutional Court repealed the provision that stated that lustration covers those who perform a function in political parties and/or who are members of associations, foundations, religious communities and religious groups,<sup>39</sup> whereas in the 2012, the of decision the Constitutional Court exempted journalists, lawyers, notaries and mediators from the reach of the Lustration Law<sup>40</sup>. This decision of the Court is based on the opinion provided by the Venice Commission that the ‘application of lustration measures to positions in private or semi-private organizations goes beyond the aim of lustration, which is to exclude persons from exercising governmental power if they cannot be trusted to exercise it in compliance with democratic principles.’<sup>41</sup>

Finally, on the publication of the names of persons considered to have collaborated with the totalitarian regime, the Court interpreted the publication as a sort of a sanction for the individuals in a form of public humiliation that might have effects on other spheres of their public life. Therefore, the Court did not see this provision as a proportional solution contributing to the realization of the objective of the Law, which is to prevent such persons from assuming public function<sup>42</sup>. It is interesting that the Constitutional Court in this decision decided to take the role of defender and promoter of human rights. The Court argued that the human right to physical and moral dignity (Constitution of Macedonia, Article 11) is irrevocable and the respect and protection of the privacy of his/her personal and family life and of his/her dignity and reputation is guaranteed by Article 25 of the Constitution. As the Court confirmed:

In a democratic society with a clear separation of powers the courts are the only instance that can make final decision and make names public (of those that have been proven to have collaborated with the totalitarian regime), so a decision on whether someone has been collaborator with a totalitarian regime cannot be made by the Commission for verification of facts, which is not a judicial body with competence to make final decisions and / or decide on sanctions.<sup>43</sup>

Hence, it is important to note that the Constitutional Court’s two subsequent decisions (in 2010 and 2012) were made against the decisions of the parliamentary

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<sup>38</sup> Zharko Trajanovski, *Makedonskata lustracija (1999-2012) - Nastani, izjavi, naslovi, primena na lustraciskite propisi* [Macedonian lustration (1999 – 2012) – Events, Statements, Titles, Application of the Lustration Regulations] (Foundation Open Society - Macedonia 2012) 180.

<sup>39</sup> CC decision U. 77/2008, 24 March 2010.

<sup>40</sup> CC decision U. 52/2011 and U. 76/2011, 28 March 2012.

<sup>41</sup> Venice Commission (n 34).

<sup>42</sup> CC decision (on Lustration Law), U. 42/2008, 9, 2.

<sup>43</sup> Ibid.

majorities and governments of the time. The Court has provided protection of the Constitution and constitutionally protected human rights. However, its decisions also stopped the lustration process, and therefore, an important phase in the transition of Macedonian society to democracy was postponed as the revoked articles of the Law made the Law impossible to be implemented.

The governing party at the time – VMRO DPMNE – assessed the decision of the Court as ideological and political,<sup>44</sup> soon providing a political response to it by opening up a process of drafting a new Lustration Law, adopted by the Assembly of Republic of Macedonia in mid-2012. The second Lustration Law ignores the previous decisions of the Constitutional Court of the Republic of Macedonia. The new law allows lustration to be applied for violations preceding 2006, the year when a Law on Public Access to Information was adopted, and covers as many as 143 categories of positions to be reviewed by the Commission for verification of facts, not automatically, but only when a private person files a request to the Lustration Commission. The fact that the Macedonian Government proposed and that the Macedonian Assembly, again, passed the Lustration Law consisting of articles that had been previously repealed by the Constitutional Court was assessed as quite concerning<sup>45</sup>. Some scholars expressed the view that the 2012 Lustration Law leaves the impression that the entire Macedonian society may be lustrated,<sup>46</sup> which is contrary to the recommendations and the Resolution of the Council of Europe<sup>47</sup>. Afterwards the Law was disputed partially by two individuals and the Helsinki Committee for Human Rights, whereas another initiative submitted by three legal professionals contested the constitutionality of the whole law. Nonetheless, in April 2014,<sup>48</sup> the Court decided to reject all motions filed against the Law<sup>49</sup>. The Constitutional Court found that the new Law on lustration is constitutionally justified and deliberated that the legislative institutions have, in accordance with the Constitution, the right to define the temporal scope of the Law. Departing from their argumentation from 2010, the Court affirmed that the time span (until 2006) was in accordance with two important political acts: Resolution 1096 from 1996<sup>50</sup> and Resolution 1481 from

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<sup>44</sup> G. Ma, 'Ustavniot sud gi štiti kodošite po 1991' [The Constitutional Court Protects the Collaborators/Informers after 1991] *Večer* (Skopje, 29 March 2010) <<http://vecer.mk/makedonija/ustavniot-sud-gi-shtiti-kodoshite-po-1991>> accessed 10 July 2015.

<sup>45</sup> Trajanovski (n 38) 180.

<sup>46</sup> Marko Krtolica, 'The Process of Lustration in Republic of Macedonia: Facing the Past or Facing Political Opponents' (2013) 4 (7) *Iustinianus Primus Law Review*, 1.

<sup>47</sup> Council of Europe, 'Measures to Dismantle the Heritage of Former Communist Totalitarian Systems' Resolution 1096 (1996).

<sup>48</sup> CC decision (on Lustration Law) U. 111/2012, 9 April 2014.

<sup>49</sup> In total 14 provisions were disputed, mainly concerning the time span of the law and the range of professions subjected to check-ups, as was the case with the previous Law.

<sup>50</sup> Council of Europe (n 47).

2006<sup>51</sup> of the Parliamentary Assembly of the Council of Europe. At the same time, the Constitutional Court explained that the Law was not discriminatory towards citizens who will be subject to the procedures of lustration, but that lustration as a process serves the greater public interest through securing democracy and democratic values. Considering that this decision was made two years later and by a Court with a changed composition, one can argue that the factor of time has influenced interpretations of the Constitution and the Lustration Law by the Court. Another factor that influenced the decision was inevitably the human factor. The change of mind of the new Justices was interpreted by many as politically biased act. For example, Cvetanka Ivanova is singling out this case as the ‘best example for lack of court’s independence.’<sup>52</sup> The case presented above specifically demonstrates how the Court’s decisions may change in time and how politics shape the Constitutional Court’s role in a polity. Although the first judicial review of the Law on Lustration was valuable, it seems that, in Tushnet’s words, ‘it was pointless’,<sup>53</sup> as the political practice that followed was unaffected by that decision.

## 2.2. The Constitutional Court as Part of the Judiciary

Although the Constitutional Court is not part of the judicial system, the interviews conducted for the purpose of this paper showed that all Justices, academics, legal professionals, journalists and politicians see the Constitutional Court as part of the judiciary and, in that respect, recognize the Court as a legal, rather than a political, institution. Nonetheless, its authority to decide on complaints from citizens is fairly restrictive when it comes to the protection of human and citizens’ rights and freedoms (limited to protection of only three political rights in accordance with Art. 110, p.3 of the Constitution). Such a limited provision is narrowing the scope of activity of the Constitutional Court in respect to protecting and safeguarding the efficient attainment of freedoms and rights.

Such restricted competence of the Constitutional Court of the Republic of Macedonia resulted in a very small number of petitions received and rare use of this instrument. From 1992 till 2000, the Constitutional Court received and decided on 73 petitions, 55 of which were rejected for different reasons. Most of them were rejected because the Constitutional Court had no competence in protection of

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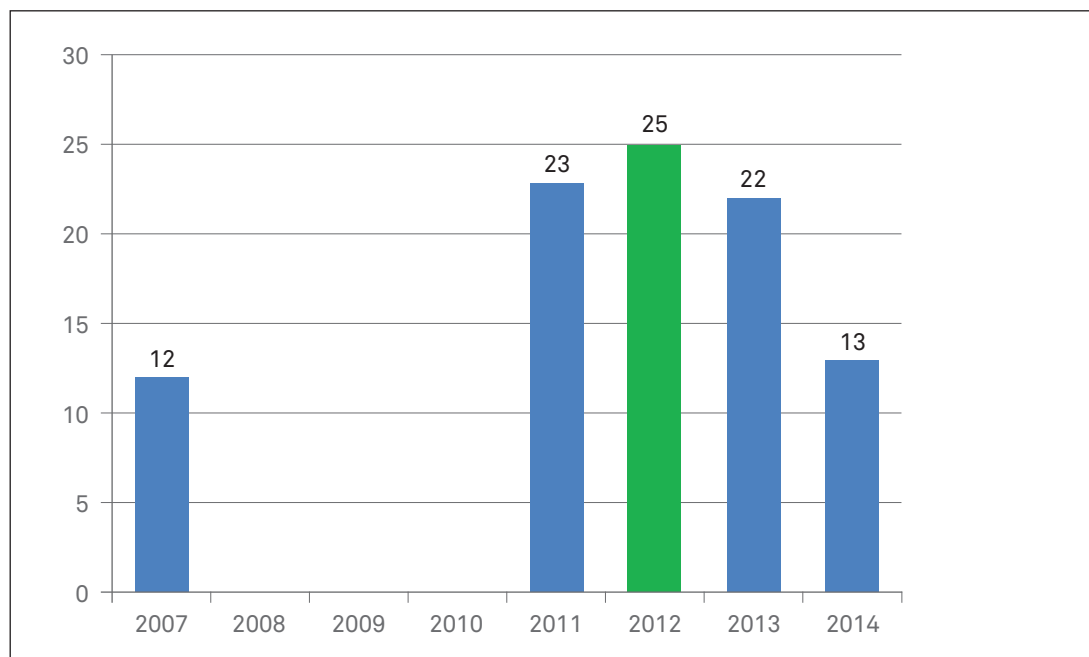
<sup>51</sup> Council of Europe, ‘Need for International Condemnation of Crimes of Totalitarian Communist Regimes’ Resolution 1481 (2006).

<sup>52</sup> Interview with Ms. Cvetanka Ivanova, lawyer, former member of parliament as representative of SDSM party, and presently member of SDSM executive Board (Skopje, 25 January 2016); transcripts are on file with the authors.

<sup>53</sup> Mark Tushnet, ‘Judiciary and Institutions of Judicial Review’ (1993) 8 American University Journal of International Law and Policy 501, 504.

the right in question; because the objective and subjective statutes of limitation were not respected; because the Constitutional Court had no competence to decide on violations of rights by acts and activities that are not individual, final or valid acts; or because the Constitutional Court had already decided on the same petition. Thus, in only 16 cases, the Constitutional Court decided on merits,<sup>54</sup> and all demands were unfounded. However, since 2007 this competence of the Court became more popular. Namely, the period since is characterized with a high of 25 cases in 2012 and a low of 12 cases in 2007 (see Figure 8).

Figure 8. Number of requests to the Constitutional Court for the protection of fundamental rights and freedoms



Source: Annual Reports of the Constitutional Court of Macedonia, retrieved from: <http://www.ustavensud.mk/dom>

The court decided *in merito* on two occasions: in 2010 when it decided that the political rights of Dzavid Rushani had been violated in the local elections of 2009 and subsequently cancelled the decision of the municipal electoral commission from Zajas;<sup>55</sup> and in 2012 when it rejected the complaint of Jani Makraduli, Member of Parliament from SDSM, as unfounded<sup>56</sup>. In the former case, Mr. Dzavid Rushani demanded the Court protect his right of political association and activity in accordance with Art. 110 line 3 of the Constitution of Macedonia. He argued before the Court that his political right was violated by the outdated criminal registry that effected with no issuance of certificate while, at the same time, there was no criminal conviction against him. As a result, he could not run for mayor of the

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<sup>54</sup> Treneska (n 11).

<sup>55</sup> CC decision U. 84/2009, 10 February 2010.

<sup>56</sup> CC decision U. 155/2011, 12 September 2012.

municipality of Zajas in the local elections in 2009. The foundation of the Court's decision was laid down during the public hearing in which the Court was presented with evidence from the applicant and documentation from the Administrative court, the Appellate court and the municipal Electoral Commission of the municipality of Zajas. Based on the evidence presented, the Court decided that indeed the right to political association and activity had been violated. Considering that the state through its organs allowed for the criminal registry not to be up-to-date, it contributed to the violation of electoral rights. According to the Constitutional Court, the Electoral Commission and the Administrative court were responsible for interpreting and applying the law in favor of the citizen and not against him. They should have determined the facts in the time frame of 35 days from the submission of the candidature until the local elections, especially because they had been presented evidence that the criminal conviction of Rushani was halted. Unfortunately, the Constitutional Court's decision was delivered in 2010, so it could not have an effect on the local elections almost a year after they were held.

In most cases, the Court issues a decision for dismissal upon different grounds, such as (i) lack of jurisdiction to decide on protecting the rights that are not provided by the Constitution; (ii) lack of jurisdiction to decide upon violation by an act that is not final or effective; and (iii) lack of jurisdiction to decide upon the rights and interests of the party in a particular case. Therefore, one can say that the Court has been rather self-restrained when protecting human rights. However, some of the interviewees note that creativity and wider legal interpretations in the area of protection of rights and freedoms have been limited due to the decision of the Court to repeal Article 4 paragraph 2 that reads, 'taking in consideration the principle of justice and equity,' in the Law on courts in 1996<sup>57</sup>. Namely, according to Apasiev, this has resulted in a formalist interpretation of legality of acts rather than allowing a more holistic approach in the interpretation of human rights and freedoms and especially the assessment of their violations. On the other hand, Milenkovic considers this decision as ground-breaking and revolutionary because it strengthens the Court's role to promote legality and constitutionality without going into the trap of interpretations that take into consideration the principle of justice and equity. That the paragraph was repealed early in the process of transition explains why the Court's activity in the area of protection of human rights and freedoms is characterised with self-restraint and formalism.

As noted before, the Constitutional Court of the Republic of Macedonia receives relatively few applications for the protection of freedoms and rights which is mainly the result of the limited catalogue of constitutional rights that are protected by the Court. The number of petitions to the Court has, however, slowly grown, not only as a result of the awareness raised of this type of remedy, but also as a result of the fact that many of the complaints received by the European Court of Human Rights from the country have been rejected as inadmissible due to the fact that not all domestic legal remedies were used in the pursuance of justice.

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<sup>57</sup> CC decision U. 20/1996-1-0, 9 October 1996.

### 3.

## Key Factors Influencing Judicial Activism of the Constitutional Court

As Taitel notes, 'in dynamic periods of political flux, legal responses generate a sui generis paradigm of transformative law.'<sup>58</sup> Recognizing that studying the role of courts in democratic transition is not an easy task, constitutional law scholars have identified different factors that influence the judicial activism of the court to help them analyze the transformative power of courts in a polity.

Sadurski<sup>59</sup> identifies the following factors to be critical to the activism of constitutional courts: (i) the systems of judicial selection and tenure, (ii) the institutional and de-facto conditions of judicial independence, (iii) the actual popularity of constitutional complaint, (iv) the actual popularity of concrete (court-initiated) review in comparison to abstract (politicians-initiated) review, (v) the tendency of the Court to ally with a parliamentary opposition, (vi) the availability of ex-ante review, etc., (vii) external factors: the force of imitation of other (especially, neighboring) courts and secondly, the importance of the European Court of Human Rights' case law. Jennifer Widner expands this list with additional factors relying on her 'social scientist's perspective':<sup>60</sup> (i) other actors – including the public and the legal community as a whole; (ii) influence of donors and international community; (iii) substantive law, technical and financial constraints; (iv) how the power constellation in a given context changes over time (activities and initiatives of other actors); (v) expectations regarding the role and position of constitutional courts. Ferrer Cornella, on the other hand, identifies structural and institutional features as key factors influencing judicial activism of constitutional courts<sup>61</sup>.

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<sup>58</sup> Teitel (n 22).

<sup>59</sup> Wojciech Sadurski, 'Transitional Constitutionalism: Simplistic and Fancy Theories' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law after Communism: Constitutionalism, Dealing with the Past, and the Rule of Law* (Central European University Press 2005) 9 at 1.

<sup>60</sup> Jennifer Wiedner, 'Courts and Democracy in Post-Conflict Transitions: A Social Scientist's Perspective on the South African Case' (2001) 95 *American Journal of International Law* 64.

<sup>61</sup> Victor Ferrer Comella, 'The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism' (2004) 82 *Texas Law Review* 1705, 1733-1734.

Researching and analyzing the Constitutional Court's activity in Macedonia, we have identified that selection and tenure of judges, politics and, therefore, independence, legitimacy, public trust, education and external factors, as well as time and tradition, are key factors that directly or indirectly influence the Court's role in the Macedonian polity, and for that reason, these factors deserve a thorough elaboration throughout the analysis.

### 3.1. The System of Judicial Selection and Tenure

The system of judicial selection and tenure is often considered to be one of the key preconditions for independent judiciary. That applies to the Justices in the Constitutional Court as well. Usually the selection process of Justices takes into account several criteria such as education, experience in the legal system, as well as his/her track record in bringing well-composed and well-argued decisions and rulings. In Macedonia, the selection of Constitutional Court Justices is from the ranks of the so-called 'exemplary lawyers' (Art. 109, par. 4 of the Constitution) or, more specifically, 'university professors of law, lawyers and other eminent legal experts'. However, this provision has been criticized as a vague and imprecise qualification that needs to be specified by adding minimum working experience and establishing the areas where it should be acquired<sup>62</sup>. Further to this is the recommendation by the Committee of Ministers of the Council of Europe (no. R(94)1224) which calls for a merit-based appointment of Justices with regard to 'qualifications, integrity, ability and efficiency.'<sup>63</sup>

Many of the interviewees argued that this criterion is frequently being abused and misinterpreted during the selection process by certain interest groups or political parties. This in turn, they claim, negatively influence the 'quality of the selected judges of the Constitutional Court',<sup>64</sup> the 'legal basis of their rulings'<sup>65</sup> and, by that, 'the quality of the overall justice system.'<sup>66</sup> Constitutional law scholars find unacceptable that the Court so far has not had a professor of constitutional law as its member<sup>67</sup>. Since independence (1991), only a few

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<sup>62</sup> For relevant discussion on this matter See Jeton Shasivari, 'Constitutional Judiciary in the Republic of Macedonia under the shadow of its Fiftieth Anniversary-Situation and Prospects' (2013) 9 (3) *Acta Universitatis Danubius* 48; Spirovski (n 5).

<sup>63</sup> European Commission for Democracy through Law (Venice Commission) (n 8).

<sup>64</sup> Interview with Mr. Jugoslav Milenkovic, Senior legal expert at the Constitutional Court of Macedonia (Skopje, 17 December 2015).

<sup>65</sup> Interview with Dimitar Apasiev PhD, Docent at "Goce Delcev" University, Faculty of Law, Stip, Macedonia (Skopje, 12 December 2015).

<sup>66</sup> Interview with Prof. Gordana Siljanovska-Davkova, PhD, Law Faculty "Iustinianus Primus", University "Ss. Cyril and Methodius" (Skopje, 5 December 2015).

<sup>67</sup> Ibid.



professors of law found their place on the Court. The minimum time of service as barrister or as judge in the Basic, Appellate and Supreme courts has, on the other hand, never been determined as a criterion. This in turn is an indication that “the Judges of the CC are not ‘exemplary lawyers,’ which is in breach of the Constitution of Macedonia (Art. 109, par. 4).”<sup>68</sup> Although this perception is common for most of the interviewed experts for the entire history of the Court, there are others, like Ms. Cvetanka Ivanova,<sup>69</sup> who claim that the criterion of ‘exemplary lawyers’ has not been misused in the previous mandates of the Constitutional Court but that ‘the current composition of the Court does not meet the criteria of exemplary lawyers’<sup>70</sup>. This is seconded by Mr. Apasiev who believes that the current Justices in office are ‘the weakest Justices the Court had since the country’s independence.’<sup>71</sup> Stamen Filipov, on the other side, relates the selection of the judges with the public trust in the institution. He claims that ‘due to the fact that not exemplary lawyers are Justices in the Court the people do not trust them and therefore they do not trust the Constitutional Court.’<sup>72</sup>

Spirovski considers term in office of the Justices as the strongest direct guarantee of independence. The Justices are elected for a term of nine years (Art. 109) without having the right to be re-elected. The term in office is the longest of any appointed official in the Macedonian system and ensures independence from politics as it is more than two times longer than the term of the body that elects Justices (the Assembly). However, ‘as the criteria of selection has not been defined precisely, very often the elected Justices are not at the end of their career but rather have to look for new jobs after their term in the Court’<sup>73</sup> which makes them more vulnerable to political pressures. The system of nomination and appointment with majority votes from members of Parliament aims to provide balance and to guarantee independence from any political influence as well as independence of the Justices. However, the history of the Court shows that there is a great politicization in the appointment process. Given that Justices of the Court are elected by the Parliament (Sobranie) with majority vote, each new coalition of political parties can impose its will on the composition of the Macedonian Constitutional Court.

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<sup>68</sup> Filipov (n 31).

<sup>69</sup> Ivanova (n 52).

<sup>70</sup> Ibid.

<sup>71</sup> Apasiev (n 65).

<sup>72</sup> Filipov (n 31).

<sup>73</sup> Siljanovska-Davkova (n 66).

## 3.2. Education

The Justices need to have ‘intellectual independence, meaning to have good knowledge of the Constitution, to be devoted to protect it from violations with their personal ethics and to the best of their knowledge.’<sup>74</sup> In this respect, the reputation of the Justices is also important and is scrutinized with the public trust of their independence. Education is a factor that especially influences the role the Constitutional Court plays in the Macedonian polity. Currently, only two Justices have PhDs in law (and both are women – Natasha Gaber-Damjanovska and Gzime Starova), whereas the remaining seven judges are lawyers without even a master’s degree in law. This is a result of the fact that education as a criterion for the selection of Justices is not set at all, apart from the general reference to lawyers. In this way, the only criterion related to education that potential candidates need to meet is to have a law degree. Although Article 109, p. 4 of the Constitution says the Justices are elected from the group of renowned jurists, ‘the ones elected are not well equipped with necessary legal expertise.’<sup>75</sup> The education of the Justices is especially important when it comes to the interpretation of regulation related to human rights and freedoms, along with international law, and European law in particular. This is particularly relevant because human rights law, international law and European law have been added to the curriculum of the higher education institutions currently operating in the country recently. Only three universities are accredited to organise doctoral studies in law, of which two are public institutions and one is private. Only eight universities offer specialised international law studies, and just three universities offer EU law as a special module, although some offer master’s programmes in European Studies. It is important to note that the graduates from these programs are rather young and are usually not referred to as exemplary lawyers and therefore have little chances to be elected as Constitutional Court Justices. Hence, the Justices on the Constitutional Court since independence have not possessed sufficient education in human rights, international and European Union law.

What is more, the criteria for the selection of judges on the Court do not require the Justices to go through training organized by the Academy for Training of Judges and Public Prosecutors Act (OG No. 13/2006) established in 2006, which has a program that encompasses international law and EU law in particular and puts specific focus on the European Convention on Human Rights (ECHR). This suggests that the ability of many lawyers in Macedonia to apply the case law of the European Court of Human Rights (ECtHR) and other international courts is also limited. The competences of the Justices have been most vocally criticized

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<sup>74</sup> Interview with Justice Mirjana Lazarova Trajkovska, present judge in the ECHR, former judge of the Constitutional Court of RM (Skopje, 9 September 2015); transcripts on file with the authors.

<sup>75</sup> Filipov (n 31).

by many interviewees<sup>76</sup> but also by politicians. Even the Prime Minister, Nikola Gruevski, at one point was unsatisfied with a decision of the Court and stated that ‘some of the Court’s members did not possess the necessary education.’<sup>77</sup> The statement was strongly opposed by the President of the Court at that time, Judge Trendafil Ivanovski, stating that ‘the Court is under no influence and suggested that the next time a politician engages in a discussion about judges’ competences, it should be supported with facts and not based on mere speculations.’<sup>78</sup>

### 3.3. External Factors

Although separate from the judicial system, the Constitutional Court interacts with the decisions of the other courts in Macedonia only when deciding in cases concerning the protection of human rights. Namely, the Court organizes public hearings where they also invite experts, judges and legal practitioners to debate the case subject to judicial review. The case law analysis of the Court shows that the Court refers to the decisions and actions taken by the lower courts and analyses their decisions. However, it is also true that the judges in Basic, Appellate and Supreme courts have never taken an active role and submitted an initiative to the Constitutional Court. Legal professionals see such a passive stance of ordinary courts as an indication that ‘judges do not want to reprimand the policy makers’,<sup>79</sup> although the tenure of the lower court judges is for life which makes them less vulnerable to political influences.

What is more, the decisions of courts in neighbouring countries, other international courts and the ECtHR case law are also important external factors in assessing the role of the Constitutional Court in the Macedonian polity. The Constitution of Macedonia regulates the position of international law in the legal order of the country and thereby sets out an important basis for the application of international law in Macedonia. Article 118 of the Constitution stipulates that international agreements that are ratified and in accordance with the Constitution are an integral part of the domestic legal order and cannot be changed or derogated by laws. Given that ratification is needed for an international legal act to be transformed into the national legal system, one might conclude that Macedonia there embodies a dualist system when it comes to the incorporation of

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<sup>76</sup> For example Judge Margarita Caca Nikolovska, Dimitar Apasiev, Stamen Filipov, etc.

<sup>77</sup> Nikola Gruevski, former Prime-minister of the State, ‘Koi se motivite na Ustaven sud?’ [What are the Motives of the Constitutional Court?] <[http://star.kanal5.com.mk/\(X\(1\)S\(xji0mvtjysysrb55gccmwx45\)\)/default.aspx?mld=37&eventId=57897&egld=13&AspxAutoDetectCookieSupport=1](http://star.kanal5.com.mk/(X(1)S(xji0mvtjysysrb55gccmwx45))/default.aspx?mld=37&eventId=57897&egld=13&AspxAutoDetectCookieSupport=1)> accessed 18 February 2016.

<sup>78</sup> Trendafil Ivanovski, former President of the Constitutional Court, ‘Neprestanuva pritisokot i etiketiranje to vrz ustavnite sudii’ [The pressure and labeling of Constitutional Court Judges does not stop] Vecer Daily newspaper (18 February 2010) <<http://daily.mk/auto/ustavniot-sud-go-shtiti-ustavot-bez-politichko-vlijanie>> accessed 8 February 2016.

<sup>79</sup> Filipov (n 31).

international acts in national law<sup>80</sup>. The Constitution also stipulates the hierarchy of domestic and international general legal acts. Emphasising the unity of the Macedonian legal system, Article 51 also regulates that the Constitution is the supreme legal act. To this effect, all laws and other general legal acts promulgated in the Republic of Macedonia must comply with the Constitution, and all other regulations must comply with the laws and the Constitution of the Republic of Macedonia. In this respect, international treaties and other international legal acts that are transformed into the Macedonian legal system through a ratification act adopted by the Parliament have equal treatment as domestic legal acts, although the Constitution stands above them in the hierarchy.

The Constitution of the Republic of Macedonia explicitly specifies the incorporation of international legal sources within the national legal system. For example, Article 8 on the basic values of the constitutional order of the country regulates the fundamental human rights and freedoms recognised by international law and determined by the Constitution (par. 2) and respect for the generally accepted norms of international law (par. 12). But the only law in domestic jurisprudence that makes a reference to direct application of the rights stipulated in an international legal document, including the decisions of an international court, is the recently adopted Civil Liability for Defamation and Libel Act. Article 2 (paragraph 2) of this act stipulates that 'limitations on freedom of speech are regulated by this law in accordance with the European Convention for Human Rights and the practice of the European Court of Human Rights (ECtHR).'<sup>81</sup>

However, education remains a factor strongly interrelated with external factors when one analyses the role of the court in the Macedonian polity. Lack of education and training in international law, EU law or human rights law, as well as lack of proficiency in different languages, decrease the possibilities for transnational relationships between courts and application of international law or the jurisprudence of international courts. In such circumstances, the Constitutional Court has not had one strategy when applying the jurisprudence of the European Court of Human Rights (ECtHR). Namely, in a review of all relevant decisions delivered between 1991 to the end of 2014, one may notice that the Court interchangeably chooses to (i) ignore the decisions by ECtHR, (ii) apply the decisions made by ECtHR in certain cases and uses them to justify its own decisions, or (iii) explicitly refuse direct application as the jurisprudence of the ECtHR cannot be interpreted as a source of international law<sup>82</sup>.

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<sup>80</sup> From the dualistic perspective, international and national law represent two separate levels. Hence, a transformation act into the national legal system is needed according to Christine Amrhein-Hofmann, *Monismus und Dualismus in den Völkerrechtslehren* (Duncker & Humboldt 2003) 88-144.

<sup>81</sup> "Zakon za građanska odgovornost za navreda i kleveta" [Civil Liability for Defamation and Libel Act], *Official Gazette RM* 143/2012.

<sup>82</sup> Marija Risteska and Kristina Misheva, 'The Application of International Law in Macedonia' in Siniša Rodin and Tamara Perišin (eds), *Judicial Application of International Law in Southeast Europe* (Springer 2015).

With respect to the impact of international courts' decisions in Macedonia, Risteska et al conclude that 'there is a consistent gap between policies to apply decisions or refer to the jurisprudence of international courts and their implementation. The Constitutional Court especially does not have consistency in interpretation and application of the ECtHR decisions and diverges from using them as legal base for a judgement, refers to them to elaborate on a decision or rejects application as the international court decisions are not sufficient basis for the Constitutional Court to make a judgement.'<sup>83</sup>

### 3.4. Tradition

Given the interplay between the system of selection and tenure of the Constitutional Court Justices and the legal education and competences to apply international law or the jurisprudence of the international or foreign courts, it is expected the Constitutional Court will turn to legal tradition when making decisions. Hence, case law analysis shows that the Constitutional Court often uses the prospective approach when deciding on cases. It recognizes the legal continuity of the previous (socialist) system of principles and values. The cases presented below in particular depict the limited capacity of the Court to interpret human rights and to play a revolutionary role in the promotion of gender equality as a social value.

#### Law on Defense and Law on Abortion

"The World Macedonian Congress" lodged a petition with the Constitutional Court challenging the constitutionality of Articles 3.1 and 2 of the Law on Defense. In the petitioner's view, the provisions at issue violated the principle of equality and promoted sex-based discrimination (violation of Art. 9, Art. 28, Art. 51 and Art. 54 of the Constitution), as they regulated that all male citizens between 17 and 55 years of age are obliged to do military service, whereas women can serve in the military if they voluntarily register as military recruits at any time until the end of calendar year when they are 27. The Constitutional Court in its decision U. no. 119/2001 decided that 'the existence of different legal regimes for military service for men and women (it is mandatory for former and voluntary for the latter) does not constitute a violation of human rights and freedoms nor does it create inequality among persons, according to their sex.'<sup>84</sup> The legal provisions were, in addition, regarded by the Court as 'a confirmation of the state's interest and care for women, due to the fact that they may become mothers.'<sup>85</sup> However,

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<sup>83</sup> Ibid.

<sup>84</sup> CC decision (on Judicial review of Law on Defence) U. no. 119/2001, 3 October 2001.

<sup>85</sup> Ibid.

the Court did not provide explanation why the limitation was put at age of 27. Does that mean that the law and the Constitutional Court foresee women becoming mothers by that age? What happens if a woman does not like parenthood? Doesn't this age limitation violate the principle of equality as men may become fathers as well but without age limits? In the pursuit to protect pregnant women and mothers, and in line with its traditional understanding of the role of women in society, the Court has favored traditional values over basic values of gender equality.

Similarly, the Constitutional Court was in the spotlight for the promotion of predominant conservative values, as regards women's rights, again in 2014 when it decided not to initiate the procedure for judicial review of the constitutionality of the Law on Abortion. The majority of Justices in the Constitutional Court shared the opinion that the new Law does not hamper women's constitutionally guaranteed right to decide freely on the matter of conceiving children and terminating a pregnancy but regulates the procedure regarding how to do it, authorizing relevant institutions and commissions to approve the procedure prior to termination of pregnancy. The debate in the Court over the initiative to assess the constitutionality of the Law has, however, stirred public discussion and prompted with criticism for the role of the Court in the protection of basic human rights. Civil society activists warned that in the debate, 'instead of providing legal arguments, many of the Justices used their personal beliefs, experiences, fears and ideology as a basis for their decision.'<sup>86</sup> Judge Sali Murati at a public press conference even stated that for him abortion is "murder", which was followed by the famous statement that 'every woman's dream is to get married and become a mother.'<sup>87</sup> With this decision and the accompanying explanation, the Court again reinstated that a woman's role in Macedonian society is primarily that of a mother. Another statement suggested that the Court with this decision was more leaning 'to protect the life of an unborn child that begins with conception',<sup>88</sup> rather than the reproductive rights of a woman.

Nonetheless, not all Justices were of the same opinion. Judge Damjanovska Gaber had a dissenting opinion on the matter of abortion. She stated that 'women who want to terminate their pregnancy are being discriminated because of the additional conditions they need to meet and additional papers they need to fill

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<sup>86</sup> Interview with Bojan Jovanovski, Executive Director of HERA published in 'Macedonian Court Backs Restrictive Abortion Law, Overrules NGO Challenge' (*International Planned Parenthood Federation*, 28 October 2014) <[www.ippfen.org/news/macedonian-court-backs-restrictive-abortion-law-overrules-ngo-challenge](http://www.ippfen.org/news/macedonian-court-backs-restrictive-abortion-law-overrules-ngo-challenge)> accessed 19 February 2016.

<sup>87</sup> 'Za Ustaven sud zakonot za prekinuvanje na bremenosta ne e protivustaven' [For the Constitutional Court the Law on Termination of Pregnancy is not Unconstitutional] *Vesti* (Skopje, 8 October 2014) <<http://vesti.mk/read/news/3367556/1209540/za-ustaven-sud-zakonot-za-prekinuvanje-na-bremenosta-ne-e-protivustaven>> accessed 19 February 2016.

<sup>88</sup> Ibid.

out, compared to other patients in need of other types of medical interventions.<sup>89</sup> She openly opposed ‘the usage of the word ‘approved by’, stating that no other surgical procedure legally requires a previous approval from the state<sup>90</sup> and that is why with the Law women have not been equal treated. This dissenting opinion, more than others, echoed in the experts and wider public and fused a debate on whether the changes in the law are just limiting the modern liberal concept of human rights that has been enshrined in the Macedonian Constitution or are discriminating against women as opposed to other patients.

In both decisions the Court argued that the disputed provisions should be assessed in relation to all human rights and freedoms enshrined in the Constitution, being recognized and accepted by international law. Nonetheless, the Court did not refer to any international source of law or foreign jurisprudence, but in the first case, cited the legal tradition and the need of special protection of women as an interpretation of why the law “favors women”; and in the second case, the Court used traditional conservative values to interpret the decision of constitutionality of the Law on Termination of Pregnancy. To this end, in the first case, even the legal tradition is misinterpreted as the socialist legal system promoted special protection for pregnant women and mothers rather than women in general; and in the second case, the diversion from legal interpretation of the law and the use of moral and ideological arguments prevented the Court from having a transformative role in Macedonian society, as it used its decision to restore traditional values.

### 3.5. Time

Time is, however, the most important determinant, as interpretations of the role of transformative law and the influence of courts in a polity may change in time. As Tushnet notes, in time it is possible that ‘the lesson will be, not that judicial review is valuable, but that it is pointless’; it may become seen as putting ‘a façade of legality and constitutionalism on a purely political practice that continued unaffected by the Constitutional Court’s decision.’<sup>91</sup> The most relevant case that can illustrate that judicial review is valuable but in time just provides legality of a political practice that is unaffected by the Court’s decision is the case on the Law on Use of Flags.

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<sup>89</sup> Natasha Gaber Damjanovska, Judge at the Constitutional Court, ‘Gaber voizdvoeno misljenje za abortusot: Ženata e diskriminirana’ [Gaber with a Dissenting Opinion about the Law on Abortion] *Fokus* (Skopje, 6 November 2014) <<http://fokus.mk/gaber-vo-izdvoeno-mislen-e-za-abortusot-zhenata-e-diskriminirana/>> accessed 8 February 2016.

<sup>90</sup> *Ibid.*

<sup>91</sup> Tushnet (n 53) 501-504.

## Law on Use of Flags

The Constitutional Court decided twice in the case of the Law on Use of the Flags. In 1997, based on an initiative of a group of members of the municipal council from SDSM in Gostivar, the Court reviewed the constitutionality and legality of the Statute of the municipality that regulated the flag of Republic of Macedonia together with the flags of the Albanian and Turkish nationalities and the flag of the city of Gostivar which were to be continuously displayed on the municipal building. The Constitutional Court decided twice: an interim decision was made in May 1997 and a final decision was made in June 1997. In the final decision, the Constitutional Court repealed Art. 140 of the Statute of the Municipality of Gostivar, arguing that the municipality does not have the right to regulate the use of flags according to Art. 48 of the Constitution. At the same time, the Court deliberated that the articles of the Law on Use of the Flags<sup>92</sup> (that dates from the period before independence, more specifically 1973), which regulated the use of the flags of the nationalities and ethnic groups in the country, had not been enforced since 1989, when the Amendments (XXIV – LIV) of the Constitution of the Socialist Republic of Macedonia<sup>93</sup> were adopted<sup>94</sup>. What is more, the constitutionality and legality of the Statute was brought into question by the Court with respect to the provision to display the flags continuously while the Law on Use of the Flags regulates specifically on what occasions the state flag should be used<sup>95</sup>.

The decision is of great importance for the state-building process in Macedonia that commenced in 1991, considering that the country is multi-ethnic and has opted to develop its multicultural society through different vehicles of power sharing between the dominant ethnic groups, in particular between the Macedonians and Albanians. The effects of the decision are multiple. First of all, it was not enforced by the municipality of Gostivar, and the flags of the Republic of Albania and the Republic of Turkey have not been taken down from the masts. Secondly, it was a reason for the organization of protests, police intervention for enforcement of the decision, three casualties and an apprehension and conviction of the Mayor of Gostivar. Convictions were made for having abused his office of Mayor and caused and inflamed national hatred, discord and intolerance among the citizens of the Municipality of Gostivar and, more widely, among citizens of other acquaintance municipalities,

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<sup>92</sup> Zakon zaupotrebanaznaminjatana zaednicitevo Republika Makedonija [Law on Use of the Flags] *Official Gazette of Socialist Republic of Macedonia* 40/73.

<sup>93</sup> Ustavna Socijalistička Republika Makedonija [Constitution of the Socialist Republic of Macedonia] *Official Gazette of Socialist Republic of Macedonia* 16/89.

<sup>94</sup> CC decision (on the review of the Statute of municipality of Gostivar) U. 52/97, 11 November 1997.

<sup>95</sup> According to CC decision U. 52/97 these are state holidays, celebrations, cultural sport and other type of manifestations and celebrating the private life of the citizens.



and for having organized resistance and disobedience toward legal decisions and government measures<sup>96</sup>.

The role of the Constitutional Court in this case has been that of a formalist defender of the Constitution. The Court did not discuss in the decision several important issues related to this case: (i) the fact that the ethnic Albanians in Macedonia contest the pillars upon which the Macedonian nation-state was built: the Constitution, local self-government and public display of national symbols<sup>97</sup>; and (ii) the need for the adoption of policy measures that will further regulate the rights of ethnic minorities to freely express, nurture and develop their national identity in accordance with Art. 48 of the Constitution. Instead, the Constitutional Court's decision remained to be a trigger for politics of conflict, which indirectly led to ethnic conflict between the Macedonian security forces and ethnic Albanian "rebel" groups in 2001.

In 2005, after a month-long heated debate, the Macedonian Sobranie adopted the new Law on Use of the Flags of ethnic communities in Macedonia<sup>98</sup> with 50 votes of SDSM and the political party of the transformed "rebels", the Democratic Union for Integration (hereinafter, DUI). The Law was interpreted as a sign for the relaxation of the inter-ethnic relations in the country, as it regulated the possibility for the flags of ethnic communities to be publicly displayed in local self-governments where the communities live. However, within the same month, five initiatives were filed before the Constitutional Court for review of the constitutionality of Articles 4<sup>99</sup>, 5<sup>100</sup>, 6<sup>101</sup> and 8<sup>102</sup> of the Law.

In 2008, the Constitutional Court delivered a final decision in this case. The decision from October 25, 2008 abrogated parts of the mentioned provisions of the Law on Use of Flags. Namely, the Court decided that the Law is constitutional

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<sup>96</sup> Final decision as to the admissibility of Application no. 50841/99 by Rupi Osmani and Others against the Former Yugoslav Republic of Macedonia <[www.pravda.gov.mk/txt/presudi/eng/osmanieng.htm](http://www.pravda.gov.mk/txt/presudi/eng/osmanieng.htm)> accessed 30 September 2015.

<sup>97</sup> Zidas Daskalovski, 'The Implementation of the Ohrid Agreement in the Public Sector: Equitable and Just Representation of Citizens' in Vladimir Milchin et al. (eds.), *Macedonia in the Aftermath of the Framework Agreement* (FOSIM 2006).

<sup>98</sup> "Zakon za upotreba na znamenjata na zaednicite vo Republika Makedonija" (n 92).

<sup>99</sup> Regulates that in the municipality where ethnic communities live and are a majority of the population, in front of the municipality building and municipal institutions the flag of the community will be flown together with the flag of Republic of Macedonia.

<sup>100</sup> Regulates that in the municipality where ethnic communities live and are a majority of the population, in front of the state buildings, institutions, public services, infrastructure objects, etc., the flag of the community will be used along with the flag of Republic of Macedonia during state holidays.

<sup>101</sup> Regulates that in the municipality where ethnic communities live and are a majority of the population, the flag of the community will be used along with the flag of Republic of Macedonia during international meetings, visits, celebrations and cultural, political and other events.

<sup>102</sup> Regulates how the flag of Republic of Macedonia is displayed together with the flags of the communities and the flag of the municipality/city.

and in accordance with Amendment 8 of the Constitution. However, the Court opined that the right to use their flag should not be pertinent to the numerical strength of a community in a given municipality because it is not in line with Amendment 8 of the Constitution and Article 20 and 21 of the Framework Convention for the protection of the national minorities. Therefore, the Court opted to delete the words indicating “majority of the population”, allowing in that way the public display of the flags of all ethnic communities that live in the respective municipalities. Since the state flag presents state sovereignty, the Court decided only this flag could be used in state institutions, while in front of the municipal buildings, the use is extended to the flags of all communities (i.e. Turkish, Serbian, Roma, Vlach, etc.). In this regard, the Court’s decision is not just strictly protecting the Constitution but contributes to the state building of Macedonia as a multicultural state of all its communities, limiting the trend of the development of the country as a binational state of Macedonians and ethnic Albanians as the dominant ethnic communities. At the same time, with the limitation of the use of flags of ethnic communities on the municipal level, the Court supports the process of decentralization by regulating the municipality’s obligations to provision exactly on what occasions and how the flags will be used.

In this case, the Court used international law and applied practice from other transitional democracies in the interpretation of its decision, providing additional justification that the use of the national symbols of other states is not against the sovereignty and state integrity of Republic of Macedonia<sup>103</sup>. Considering that the flags of the ethnic communities in Macedonia are state symbols of, i.e., the Republic of Albania, Republic of Turkey, Republic of Serbia, etc., the Court in its decision provided legal analysis of the Vienna Convention on consular relations<sup>104</sup> which, in accordance with paragraphs 2<sup>105</sup> and 3<sup>106</sup> of its Article 29, did not prohibit the use of the national symbols of the sending state in the receiving state. Besides using the Vienna Convention as the basis of its decision, the Constitutional Court cited best practice from the Republic of Slovenia that allows, with its Constitution, the right to the Italian and Hungarian minorities to use their

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<sup>103</sup> Constitutional Review of the Law on Use of the Flags of Ethnic Communities in Macedonia, decision 133/2005, 24 October 2007 <[www.ustavensud.mk/domino/WEBSUD.nsf/ffc0feee91d7bd9ac1256d280038c474/f0f77feb649e1e7fc12573800037b2a9?OpenDocument](http://www.ustavensud.mk/domino/WEBSUD.nsf/ffc0feee91d7bd9ac1256d280038c474/f0f77feb649e1e7fc12573800037b2a9?OpenDocument)> accessed 20 September 2016.

<sup>104</sup> Macedonia is a signatory party of the Vienna Convention for consular relations since 1993 with the Decision no. 23-2185/1 from 28 July 1993 published in Official Gazette no. 48/1993.

<sup>105</sup> Art. 29 para. 2 reads: ‘The national flag of the sending State may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.’

<sup>106</sup> Art 29 para. 3 reads: ‘In the exercise of the right accorded by this article regard shall be had to the laws, regulations and usages of the receiving State.’

national symbols as their own in the country<sup>107</sup>. Nonetheless, the public display of the flags of ethnic minorities during international meetings and visits is not constitutionally justified as these flags nurture the identity of the communities and not the national sovereignty:

[I]n case when welcoming or sending off the holders of the highest state functions or during visits of foreign statesmen or high representatives of the international community (line 5) the flag of the members of the communities is hoisted, the hoisting of the flag of the members of the communities may not gain the treatment of a flag with which the identity of the members of the communities is expressed and fostered, since on such occasions the identity of the communities may not be expressed, but a state sovereignty. On the occasion of such events, in the assessment of the Court it is constitutionally justified to hoist only the state flag<sup>108</sup>.

Bearing in mind that the issue of use of flags is highly political, the effects of the Constitutional Court's decision were of most importance to the polity. Considering that the Court's decision had the potential to consolidate the post-conflict democracy of Macedonia, it is important to see how other actors – the public, political parties in power and in opposition, and the legal community as a whole – accepted the decision. Namely, at the time when the Court was reviewing the Law on Use of the Flags, the case created tension between political parties of ethnic Albanians and ethnic Macedonians. The tautness culminated with the Court's ruling. Ethnic Albanians framed the issue as banning the display of the Albanian flag on buildings and places of national significance, limiting the use of the flag at the municipal level, despite the Court's claim that its ruling in fact 'gives the possibility to use the flags of all ethnic communities living within the respective municipalities.'<sup>109</sup> This created political pressure that resulted in the President of the Constitutional Court Jusufi, and Justice Polozhani (both from Albanian ethnic descent) to resign. Justice Jusufi gave an interview for the national broadcaster the very evening when the decision was delivered and a week before it was published, portraying it as "political" and stating that he needed to resign in order 'to send stronger message as dissent will not have any influence.'<sup>110</sup>

The democratic character of the decision was not universally recognized across the state. Mayors of ethnic Albanian origin rejected the decision, claiming

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<sup>107</sup> Constitutional Review of the Law on Use of the Flags of Ethnic Communities in Macedonia (n 103).

<sup>108</sup> Ibid.

<sup>109</sup> Biljana Zafirova, 'Znaminjata donesoa ostavki vo Ustavniot sud' [The Flags Brought Resignations within the Constitutional Court] *Vecer* (Skopje, 30 October 2007) <<http://vecer.mk/makedonija/znaminjata-donesoa-ostavki-vo-ustavniot-sud>> accessed 15 July 2016.

<sup>110</sup> Ibid.

that it violated the spirit of the Framework Agreement<sup>111</sup>. The Constitutional Court in an official statement qualified the comments and criticism of the decision as pressures on the work of the Court, especially because the decisions of the Court should not be commented on but should first be published, read, analysed and then enforced<sup>112</sup>. Such reasoning is entrenched in the tradition of the Macedonian Constitutional Court and has been very much used by the Justices in the period since independence until 2007. Justices tend to expand the interpretation of the effects of their ruling so much that they expect the wider and expert public not to comment on the decisions that are final and binding. The non-commenting culture of the Constitutional Court's decision is especially evident in academia as none of the constitutional law scholars has analysed the Court's jurisprudence.

Hence, the Constitutional Court's decision did further inform policy dialogues on the matter of the use of flags of ethnic communities. It was used as a basis for the subsequent changes to the Law in 2011 that stipulated communities representing more than 50 percent of the population in a local self-government could hoist their flag alongside the national flag at public and local buildings, as well as empowering the local authorities to decide when the community flag is to be used. The amendments also foresaw that the national flag was larger by one-third compared to other flags. The community flag could also be hoisted during official visits by high representatives of the international community in the municipality and during days of local and international events organized by the municipality.

Such an aftermath shows that the first judicial review of the use of flags has indeed proved pointless over time, while the last judicial review by the Constitutional Court had an important socially transformative role in Macedonian society. Although the last decision of the Court was not accepted by the Albanian ethnic community and political leaders, it eventually had a "feedback effect". Namely, the debate over the Court's decision facilitated the identification of expectations of the Albanian community and the legal options to meet such expectations (elaborated in the Court's decision). Hence, the Constitutional Court had an important role in the design of the proposed policy solution, and with that it took a transformative role in Macedonian society.

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<sup>111</sup> By spirit of the Ohrid Framework Agreement in this context, it is understood that the veto power minority communities have in the legislature should be respected by the judiciary. The Law on Use of Flags was voted with application of the Badinter principle. On the other hand, the Justices in the Court are elected using the Badinter principle, but the decision-making of the Court is not based on this principle.

<sup>112</sup> Interview with Justice Mirjana Lazarova Trajkovska for Radio Free Europe (11 November 2007) <[www.makdenes.org/content/article/1485147.html](http://www.makdenes.org/content/article/1485147.html)> accessed 1 August 2015.

## 3.6. Legitimacy

In transition countries, the role of constitutional courts is crucial for democracy. As in constitutionalism, the main argument when discussing the transformative role the courts have is around legitimacy. Sadurski elaborates three dichotomies when explaining the legitimacy of constitutional courts. The first dichotomy refers to how trustworthy courts are (sociological legitimacy) and how courts' judgements are respected with regard to independence, reason and consistency (normative legitimacy). The second dichotomy refers to the compliance of the Court with constitutionally recognized limits and working under constitutionally defined standards (formal legitimacy) and meta-constitutional legitimacy that is focused on whether or not the key actors accept that the Court should enjoy the status and competences envisaged by the Constitution. The third dichotomy refers to input legitimacy – the process of election and authorization by parliament, charisma or reputation of individual justices etc. – and output legitimacy, the consequences of their actions in relation to dominant political values in a society<sup>113</sup>.

### Sociological Legitimacy

Sociological legitimacy is all about the trust the Constitutional Court enjoys. According to Sadurski,<sup>114</sup> whether or not we can trust that one particular institution more than another will strive to articulate human rights, rather than pursue the self-interest of its members, depends on a great variety of factors related to the formalised patterns of screening, selection, accountability, length of term, revocation, etc. of those who people the institutions. Hence, whether the institution and its decisions are trusted depends on the authority of judges, the quality of their decisions and the institution's authority to transform the polity and enhance democratic values. To this end, it is not expected that the Court will decide in a direction that will please the public but according to the law and according to the judges' conscience, whatever the attitude of the public may be.

Therefore, the trustworthiness of the Constitutional Court should not be compared to another institution (or another set of institutions) in its actual operations. Several representative surveys conducted by CRPM explore trust in institutions, or to be more precise, perceptions of trust in institutions in Macedonia. The survey results show that citizens overall distrust courts. More than half (58.8%) claim that they have no trust or mostly don't trust the courts. Since twice as many respondents distrust the courts, compared to 34.9% who mostly trust or have a high trust, it is questionable whether we can use the data as proxy for

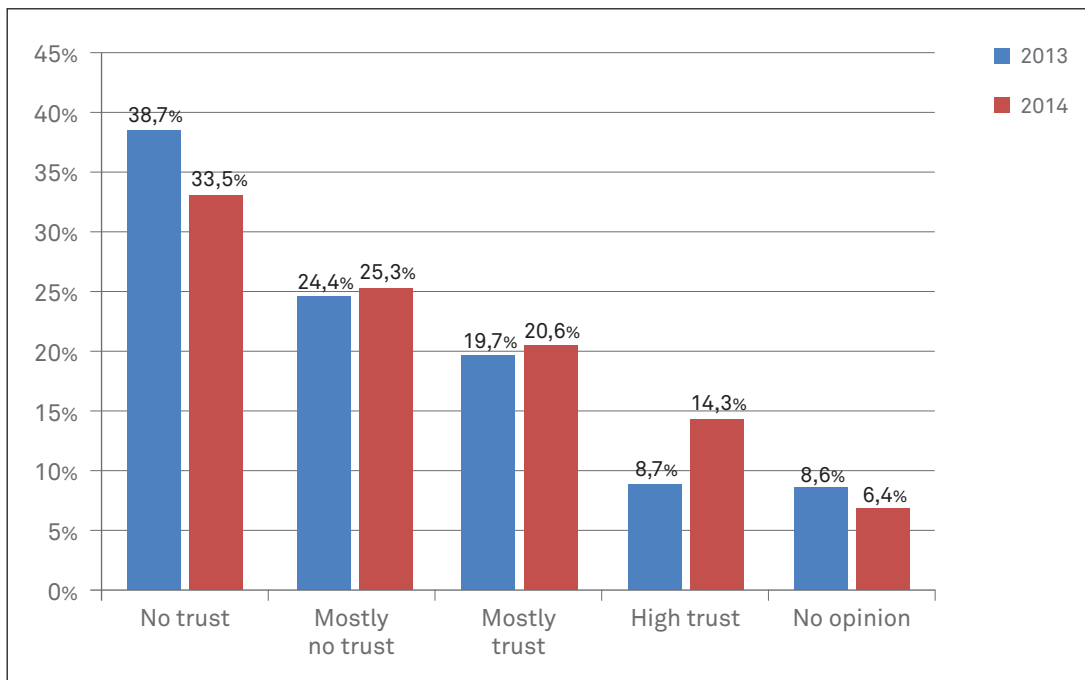
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<sup>113</sup> Wojciech Sadurski, 'Constitutional Courts in Transition Processes: Legitimacy and Democratization' (2011) Sydney Law School, Legal Studies Research Paper No. 11/53 <<http://ssrn.com/abstract=1919363>> accessed 5 October 2015.

<sup>114</sup> Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2008).

the trust in the Constitutional Court as well. Given that the Constitutional Court is a sui generis institution and not part of the judicial system, and considering that in other post-communist countries the citizens distrust regular courts but have higher trust in the Constitutional Court,<sup>115</sup> we cannot take the survey results presented in the figure below as a reliable indication of trust in the Constitutional Court.

Figure 9. “What is your trust in the courts?” Questions from CRPM representative surveys from 2013 (1105 respondents) and 2014 (1100 respondents)



In the absence of reliable survey data on the trust of citizens in the Constitutional Court, we rely in this part of the analysis on media clippings and interviews. The legal professionals we interviewed for this study share a perception that trust in the Constitutional Court is rather weak. ‘Mainly because the Court is protecting the government policies rather than the constitutionality and legality’,<sup>116</sup> says the champion in initiation of judicial review cases in Macedonia, Mr. Stamen Filipov. But, in contradiction to the perception that trust in the Court is low, Mr. Stamen Filipov continues to bring cases before the Court. Spirovski also claims that politicians have great influence on the level of public trust in the institution. Publicly expressed “criticism” by senior officials, especially by the President of the Government, when they are dissatisfied with certain decisions of the Court

<sup>115</sup> Renata Uitz, ‘Constitutional Courts in Central and Eastern Europe: What Makes a Question Too Political?’ (2007) 2 *Juridica* 47 <[www.juridica.ee/juridica\\_en.php?document=en/international/2007/2/132526.PRN.pub.php](http://www.juridica.ee/juridica_en.php?document=en/international/2007/2/132526.PRN.pub.php)> accessed 28 February 2016.

<sup>116</sup> Filipov (n 31).

‘sends message to the public that they, the citizens, do not have a Constitutional Court that they could trust.’<sup>117</sup> Furthermore, ‘by that they incite disrespect of the Court as an institution and its fundamental role in the constitutional democracy is undermined.’<sup>118</sup>

Indeed, in the last period of two years, one can notice a parallel trend of the Court and the Justices being under fierce and permanent attack, not by prominent governmental officials, but by the politicians from the opposition and civil society activists. The attacks have ranged from personal ad hominem arguments to such as alleging the family of the President of the Constitutional Court to have been involved in student elections electoral fraud in 2002 or to unsubstantiated arguments of her family’s being rewarded with high government positions without any merit to be rewarded such positions<sup>119</sup>. These types of reactions are aimed at discrediting the Court by naming and shaming and disqualifying and labelling the judges; as well as to encourage the staging of public protests against the Court’s decision (i.e. the decision on the Law on abortion and the decision on the Law on abolition).

Like in any other field, public perceptions are managed through public relations. To that end, courts can develop efficient outreach strategies that can influence on the trust the public has in the Constitutional Court. These strategies may include ‘effective and creative use of the media and establish cooperation with civil society groups to enhance their public posture.’<sup>120</sup> However, the Macedonian Constitutional Court has done little in this regard. Although the Rules of Procedure regulate a chapter on publicity of the work of the Court, and Articles 83 and 84 determine that the work of the Constitutional Court is public and publicity is provided by (i) informing the public through the mass media, (ii) inviting the public to attend public hearings, preparatory meetings and meetings, as well as (iii) with announcements through the mass media for the decisions of the Court, the Rules also stipulate the obligation for the Court to organize at least 2 press conferences per year. This sets the public relations objectives of the Constitutional Court rather low. It also leaves the outreach strategy of the Court to the preferences of the Justices.

The review of the media clippings showed that the key variable for effective use of media to shape public opinion and therefore trust in the Court is the President of the Court. In the history of the Constitutional Court, different Presidents used different outreach strategies. While some Presidents of the Court, like

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<sup>117</sup> Spirovski (n 5).

<sup>118</sup> Ibid.

<sup>119</sup> ‘Gievska bara izvinuvanje i najavuva tužba za kleveta i navreda protiv Šilegov’ [Gievska Seeks Apology and Announces a Defamation and Insult Claim against Shilegov] (*MKD Online daily*, 28 February 2016) <[www.mkd.mk/makedonija/politika/gievska-bara-izvinuvanje-i-najavuva-tuzhva-za-kleveta-i-navreda-protiv-shilegov](http://www.mkd.mk/makedonija/politika/gievska-bara-izvinuvanje-i-najavuva-tuzhva-za-kleveta-i-navreda-protiv-shilegov)> accessed 28 February 2016.

<sup>120</sup> Vineeta Yadav and Bumba Mukherjee, *Democracy, Electoral Systems and Judicial Empowerment in Developing Countries* (University of Michigan Press 2014) 61.

Judge Inglizova, liked giving public statements throughout the procedure (in preparation, between and on public hearings and when the decision was done), others, like Judge Naumovski, preferred press conferences for each decision, whereas the current President Gosheva issues public statements without facing the media. Such issuance of written public statements is criticized by the media representatives as 'it takes a significant amount of time to report it, which results in late information not related with current events and is presented in a diluted form which is uninteresting to the media or the wider public.'<sup>121</sup> Therefore, even though the Constitutional Court has established a basic communication strategy as an important element of public trust building, its communication channels seem to be eroding away in the face of an ever increasing interest by the media and the public in the work of the Constitutional Court and its rulings. Mr. Stamen Filipov considers that 'the absence of communication strategy is harmful to the reputation of the Court and the Justices and has direct influence on the public confidence.'<sup>122</sup> As the structure of the judges changes with their mandates, 'we are witnesses of the CC holding less and less public hearings, plenary sessions, consultative meetings and each communication with the wider public and the legal experts is mostly based on minimalistic interpretation of competencies.'<sup>123</sup> Additionally, in 2015, journalists were banned from using cameras during public hearings, despite a public outcry, which damaged the Court's public image and fueled distrust in their work and competences. As media communication is an important element in trust building, the Constitutional Court has not been using it sufficiently and effectively enough. On the other side, the public statements of former Justices are also often damaging to the Court's reputation and have a negative influence on public trust in the institution. The most recent example of this has been the statement of the former President of the Court, Trendafil Ivanovski, who said that 'this institution has lost its credibility, its contribution to the protection of the fundamental freedoms and rights has degraded and its work has no impact over public trust and opinion.'<sup>124</sup>

The activism of the Court, especially in the field of the protection of freedoms and rights, bears a large potential that can be used to improve its public image, increase trust and reaffirm its role as protector of the Constitution. Nonetheless, the Court has produced the least jurisprudence in the area of protection of human rights. More decisions in this area might re-establish the principles for which the

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<sup>121</sup> Interview with Miomir Srefinovic, Journalist in Telma TV station, correspondent on legal issues (Skopje, 25 January 2016); transcripts on file with the authors.

<sup>122</sup> Filipov (n 31).

<sup>123</sup> Apasiev (n 65).

<sup>124</sup> Trendafil Ivanovski, former President of the Constitutional Court 'Preku Ustavniot sud, vlasta ja sruši ustavnosta na državata' [Through the Constitutional Court the Government is Collapsing the Constitutionality of the Country] (*Online Daily Grid*, 31 January 2016) <<http://grid.mk/read/article/11017857/preku-ustavniot-sud-vlasta-ja-srushu-ustavnosta-na-drzhavata>> accessed 20 September 2016.



citizens have signed the “social contract” in the form of the Constitution of the Republic of Macedonia and increase their trust in the Court, but also in the state. Proactive regulators, who act before the onset of institutional crisis, can increase public trust.

## Normative Legitimacy

Normative legitimacy as elaborated on by Sadurski is about respecting the courts’ judgements due to their independence, consistency and reasoning. The very fact that it divides the Court from the rest of the state bodies to which it refers in Chapter III, Organization of power, shows that the Constitution envisages the Court’s independence. However, this is an indirect guarantee of independence, whereas the Constitution provisions several direct guarantees. The term of office of the judges is nine years without the right to re-election. This, together with the constitutional guarantees for independence, immunity and the right to continue receiving salary for one year after the expiry of their term in the event of the practical impossibility of Justices to resume former jobs or ensure other appropriate appointment also reinforces the independence of individual judges – as does the provision of not having the right to be re-elected (Art. 109), so judges are not tempted to soften their approach towards the political branch in order to ease their way to re-election. The provisions of incompatibility of the judge’s office of the Constitutional Court with performing another public function, profession or membership in a political party, together with the provision of voting in absence of the public, in addition safeguards the individual judges’ independence. However, former Justice in the Court Mirjana Lazarova Trajkovska thinks that these preconditions are ‘insufficient for practicing the principle of judicial independence.’<sup>125</sup> For her and other interviewees, the personal autonomy and integrity of the Justices is of utmost importance in this context.

Besides direct and indirect guarantees for independence, Volcansek and Lockhart observe that ‘politicians are aware of the potential power of the judiciary and are anxious to staff the powerful courts with their partisans.’<sup>126</sup> One such political agreement is visible in the appointment of judges from Albanian ethnic descent by the Parliament using the Badinter principle introduced since the end of the ethnic conflict in 2001 with the adoption of constitutional amendments<sup>127</sup>. Nonetheless, some observers like Spirovski further see politicization through

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<sup>125</sup> Lazarova Trajkovska (n 74).

<sup>126</sup> Mary Volcansek and Charles Lockhart, ‘Explaining Support for Human Rights Protections: A Judicial Role’ (2012) 11 *Journal of Human Rights* 33.

<sup>127</sup> The Badinter Principle, developed by Robert Badinter who presided over the Arbitration Commission of the Conference on Yugoslavia in 1991, was designed to redistribute parliamentary power between the Macedonian majority and its minority groups. In practice, it is a veto mechanism for the Albanian community (from which the great majority of minority representatives come from) to protect constitutional provisions and legislation that they deem of “national” importance to themselves.

appointment in ‘the election of the Court with double majority vote that in practice proved to be suitable grounds for attacks, labelling and discrediting of the Constitutional Court and the judges when, based on legal reasons, they repeal some legal provisions that are considered to be important for certain policies.’<sup>128</sup> This is especially relevant for the period 2006 – 2011 when the Court repealed several policies central to the political agenda of VMRO DPMNE, which led their leader and Prime Minister Gruevski to give a public statement to reporters in 2010, alleging the politicization of Justices’ appointments by commenting, ‘I am sorry that most of the judges not only came at their posts [with party help] but are also working under party directives.’<sup>129</sup> What this indicates is that the time when specific Justices were nominated and their political inclinations, in most cases, aligned with the political agenda/ideology of the party in power at the time.

In addition to the system of nomination and selection, governing political parties have used various ways to enforce pressure on the Constitutional Court throughout time. Namely, there were occasions when the appointment of new judges was delayed, the budget of the Court cut, the honorariums of the Justices canceled, and even in the late nineties, the heating of the Court disconnected<sup>130</sup>. The most vivid example of such more or less subtle pressures on the Court is from the periods November 2007 - February 2008, and February 2008 - October 2008, just after a series of judgments were made that went against the ruling coalition, which resulted in ‘a subtle revenge and pressure on the Constitutional Court’, when the Court operated with only seven judges and ‘the competent bodies needed almost a year to complete the Court’s composition.’<sup>131</sup> In the Macedonian case, one should not ignore education and competence as a factor for political influence, as former Justice in the ECtHR Caca Nikolovska evaluates that ‘the lack of competences makes the judges more vulnerable to political influence.’<sup>132</sup> What is more, Ms. Biljana Kotevska claims that the Constitutional Court has been the subject of political and party pressure ‘which is evident from the structure of accepted and denied petitions to the CC and is in line with the immense fragmentation of the Macedonian society along political and party lines.’<sup>133</sup>

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<sup>128</sup> Spirovski (n 5).

<sup>129</sup> Sase Dimoski, ‘Ivanovski Faces the Fight of his Career’ (*Balkan Insight*, 30 September 2010) <[www.balkaninsight.com/en/article/macedonian-david-challenges-goliath/1431/4](http://www.balkaninsight.com/en/article/macedonian-david-challenges-goliath/1431/4)> accessed 28 February 2016.

<sup>130</sup> Gordana Duvnjak, ‘Avtogol na čuvarite na ustavnosta i zakonitosta’ [Auto goal of the Guardians of the Laws and the Constitution] (*Globus magazine*, 6 November 2007) <[www.globusmagazin.com.mk/?ItemID=63CEA51147308D4E99A75327E51DB011](http://www.globusmagazin.com.mk/?ItemID=63CEA51147308D4E99A75327E51DB011)> 15 August 2015.

<sup>131</sup> Spirovski (n 5).

<sup>132</sup> Interview with Margarita Caca Nikolovska, former judge in the ECtHR and President of the Institute for Human Rights in Skopje, Macedonia (Skopje, 10 October 2015).

<sup>133</sup> Interview with Ms. Biljana Kotevska, country expert at the European Policy Institute - EPI (Skopje, 11 May 2016); transcripts on file with the authors.

To this end politicians, both from position and opposition, have used public comments and the disqualification of the Court and individual Justices, labelling them as political and as favouring one or another political party and their position on policy issues. The most vivid example of this type of political pressure is from 2007 when, after the Court made a decision on the unconstitutionality of parts of the Law on Use of Flags, Macedonian society witnessed a situation when ethnic Albanian Justices were directly asked to resign by the leaders of ethnic Albanian parties because the decision was “anti-Albanian”. The judges swiftly resigned, and with that, again the debate for politicization of the judiciary was invigorated. Another example is related to 2010, when Prime Minister Gruevski told reporters that ‘during the last year and previously the Constitutional Court has been reaching catastrophic rulings, they (the Justices) are aware that their decisions are entirely politically and party motivated.’<sup>134</sup> In this period, the President of the Court, Trendafil Ivanovski, became one of the persons reviewed by the Commission for Verification of Facts, which decided that there was enough evidence that Ivanovski collaborated with the communist era security forces. A Nations in Transit report noted that the decision of the Commission for Verification of Facts (that operates under the Lustration Law) can be interpreted as a sanction that resulted in his resignation as President and a judge on the Court<sup>135</sup>. The inconsistency and especially the politicization of the Court’s decisions suggest that the conditions for normative legitimacy are not in place in Macedonia.

### Dissents

Considering the different efforts made to politicize the Court’s decisions, dissents have been used to maintain the “professional integrity of a judge.”<sup>136</sup> However, according to Spirovski, from the establishment of the court in 1964 to 2003, there were only 6 dissenting opinions of Justices, and in the period from 2003 to 2011, there were 29 dissenting opinions. This might be explained by the fact that in the beginning, the Constitutional Court was building its authority with the concurring opinions of the Court’s Justices. But, since 2003, it seems the institution became an important guarantee of the individual independence of the judges, ‘especially when the political pressures intensified.’<sup>137</sup> Some argue that with the dissents, the Justices would like to add value to the decisions of the Court, especially in cases where Justices’ individual values and beliefs prevail in the way they vote on cases, providing additional legal and constitutional arguments, and offering opposing and different interpretations and views in reaching a decision. Others, like Justice Caca Nikolovska, believe that separate opinions ‘contribute

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<sup>134</sup> Dimoski (n 129).

<sup>135</sup> Freedom House, *Nations in Transit: Macedonia* (Freedom House 2011).

<sup>136</sup> Spirovski (n 5).

<sup>137</sup> Interview with Naumovski Branko, former Judge and President of the Constitutional Court of Republic of Macedonia in Skopje, Macedonia (Skopje, 10 October 2015).

to the enforcement of Court's authority and legitimacy.<sup>138</sup> Indeed, such 'separate opinions may play an important role in enriching the constitutional debate and may help the evolution of constitutional law ... [in particular] in transitional context.'<sup>139</sup> But the Macedonian case also demonstrates downsides evident in the use of the dissents to single out, shame and blame individual Justices for the different opinions they had. It is evident that pluralism is not always accepted as a value but sharing a common view of what the constitution requires is needed.

## Formal and Meta-constitutional Legitimacy

Another important layer of legitimacy refers to the effects of the decisions of the Constitutional Court: (i) formal legitimacy (the decision remains *intra vires*) - the Justices 'do not exceed the powers granted to them by the respective constitutions, by the statutes on constitutional court or by other relevant laws of their respective jurisdictions'<sup>140</sup>; (ii) and meta-constitutional legitimacy - the decision is final compulsory as key actors accept that the Court should enjoy the status and competences envisaged in the Constitution. The Constitution of the Republic of Macedonia determines the types and legal effect of Constitutional Court decisions, and the Rules of Procedure determine some significant aspects of the legal effect. According to the Constitution, the Constitutional Court shall annul or repeal a law if it is not in conformity with the Constitution, or it shall annul or repeal other regulations not in conformity with the Constitution or law. The Constitutional Court decisions are final and binding. This means that the Court enjoys formal legitimacy because its decisions have supreme authority and are binding for all legal subjects. Thus, the Court does not need additional support to execute its decisions. The effectiveness of the decisions is strengthened through the Rules of Procedure which enable the Constitutional Court to follow the execution of decisions and, if necessary, may ask the government to safeguard the execution. In the Macedonian case, the most well-known example of the latter is the first judgement on the Law on Use of Flags when the Ministry of interior was requested to enforce a Constitutional Court judgement.

The duty for executing a decision rests primarily with the maker of the repealed or annulled act. When the Court's decision is to repeal or annul normative acts, the decision can be self-executive so to say - the normative act is no longer in the legal system. A problem arises when the organs do not respect the consequences of the repealing or annulling decision on individual acts which are to be changed or whose execution is to be banned. For example, if the latter is the case, the government may secure effectiveness in enforcing Court decisions; however, this

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<sup>138</sup> Nikolovska (n 132).

<sup>139</sup> Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14 German Law Journal 1345, 1352.

<sup>140</sup> Sadurski, *Rights Before Courts* (n 114).

solution is not that simple when the government avoids execution of the decision by introducing a new act with the same content as the repealed or annulled one.

The most difficult situation is when the state body that adopted the act is executing a Constitutional Court decision but, at the same time, initiates a new procedure for the adoption or change of the legal act with the same content as the one repealed by the Court. This in particular weakens the legitimacy of Court's decisions. In the period since the country's independence, the case where this is most vividly observed is the judicial review of the Law on Primary Education.

Meta-constitutional legitimacy of the Constitutional Court, on the other hand, is not given and can change over time, as will be elaborated in more detail below.

### *Law on Primary Education*

In 2002, the Law on Primary Education was changed to allow for the addition of an elective course on religious education to be offered to third grade students in primary schools. For this purpose the Minister of Education adopted a curriculum/educational program for religious education. The program was reviewed by the Constitutional Court in 2003. The Court repealed the educational program and the decision of the Minister for its enactment<sup>141</sup> as not relevant for the introduction of a course in primary education. The Court concluded that 'the adopted program and the decision made by the Minister are different type of authorizations that are regulated with Art. 55 paragraph 1 of the Law on organization and work of the state bodies.'<sup>142</sup> But in 2008, to achieve the same goal and introduce religious education in primary schools, the Law on Primary Education was adopted, regulating an elective subject on religious instruction designed to study substantive tenets of a particular religion (Christianity and Islam) to be introduced to public primary schools for the school year 2008/09. Alternatively, the law prescribed that pupils could choose a subject about history of religions.

The Court reviewed the Law and repealed Article 26 of the Law and thus abolished the possibility of having religious instruction in primary schools as it breached the principle of secularity of the state. It argued that religious instruction can be organized on a voluntary basis outside the public schools but not in the framework of compulsory primary education<sup>143</sup>. In its judgement, the Constitutional Court took into consideration the way in which Article 26 of the 2008 Law on Primary Education had been implemented since September 2008 and the fact that religious instruction classes were designed to educate pupils about the rules according to which an adherent to that religion should behave. The Constitutional Court emphasized that the state must maintain its neutrality

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<sup>141</sup> CC decision U. 42/2003-0-0, 5 November 2003 <<http://ustavensud.mk/domino/WEBSUD.nsf>> accessed 27 February 2016.

<sup>142</sup> CC decision U. 10-2858/1, 3 October 2002 by the Minister of education and science for enactment of the educational program/curriculum on religious education as an elective course for third grade in primary education.

<sup>143</sup> CC decision U. 202/2008-0-1, 15 April 2009.

and may not interfere in issues of faith or religious communities or confessional groups, may not motivate adherence to a certain faith, nor may it obstruct the expression of faith and impose religious conformity or demand the practice of religious activities as socially desirable conduct.

## Input and Output Legitimacy

The third dichotomy refers to input legitimacy which is the process of election and authorization by Parliament, charisma or reputation of individual justices; and output legitimacy which represents the consequences of their actions in relation to dominant political values in a society.<sup>144</sup> In accordance with the understanding of input legitimacy developed by Sadurski, the Constitutional Court of the Republic of Macedonia receives its authorization from Parliament as all of its nine judges are elected by the Parliament of Republic of Macedonia<sup>145</sup> (six of the judges to the Constitutional Court by a majority vote of the total number of Representatives, and another three with the so called Badinter principle)<sup>146</sup>. Hence, the Court has the full authorization of Parliament that includes authorization by the minority groups as well. However, to date the Constitutional Court has twice faced a situation of having to work without two, and once without three, judges. This has stirred discussion about the legitimacy of the Court to make decisions without all of its members participating in the judicial review and decision-making. While the Rules of Procedure of the Constitutional Court do not allow for the Court to decide with five judges, the absence of two and then three judges is not seen as problematic for the legitimacy of the Court by the interviewed former Justices<sup>147</sup>. Nevertheless, the public had an abundance of comments that the Constitutional Court had no legitimacy to decide until new Justices were appointed in the aftermath of the event when two judges of Albanian ethnic descent resigned due to the decision the Court made in the case on the constitutionality and legality of the Law on Use of the Flags. Hence, the absence of the two judges elected with the so-called Badinter principle is viewed by the public as crucial for the input legitimacy of the court. That in particular shows that the consensual character of the Macedonian polity must be and is expected to be reflected in the composition of the Court.

Interestingly, the many legal professionals and former Justices that we have interviewed for the purpose of this paper believe that the Court draws its

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<sup>144</sup> Sadurski, 'Constitutional Courts in Transition Processes' (n 113).

<sup>145</sup> "Constitution of RM", *Official Gazette* 52/1991, Art. 68 and Art. 109 <[www.slvesnik.com.mk/Issues/19D704B29EC040A1968D7996AA0F1A56.pdf](http://www.slvesnik.com.mk/Issues/19D704B29EC040A1968D7996AA0F1A56.pdf)> accessed 10 August 2015.

<sup>146</sup> About the Badinter Principle see (n 127).

<sup>147</sup> 'Ustavniot sud tret vo svetot prizna upotreba na zname na druga država kako zname na zaednicite' [The Constitutional Court is the Third in the World that has Recognized the Use of the Flag of Other Country as a Flag of the Communities] (*Daily Newspaper Makdenes*, 11 November 2007) <[www.makdenes.org/content/article/1485147.html](http://www.makdenes.org/content/article/1485147.html)> accessed 10 August 2015.

input legitimacy and authorization from the Constitution itself. As such, even they interpret the role of Justices as defenders of democracy in Macedonia: ‘If someone threatens the intellectual integrity and authority of the Justices that means that s/he is threatening democracy.’<sup>148</sup> On the other side, the public considers that the legitimacy of the Court derives from its decisions. Namely, the reputation of the Court and its Justices is earned through decision-making. The events in February 2016, when the Constitutional Court decided to accept the initiative of a young lawyer from Ohrid to review the Law on Pardons for annulling a provision in the Law that bars the President from granting pardons, show how one decision can affect the public reputation of the Court and its Justices. From the time the procedure was initiated, several hundred Macedonian anti-government protesters staged three protests under the motto “Let’s defend the Constitution from the Constitutional Court!” in front of the Constitutional Court, demanding the resignations of the five judges that voted to accept the initiative for judicial review. The protests went so far that the protesters singled out the Justices and publicly shamed and blamed them for being “unjust” and “servants to the criminals.”<sup>149</sup> The Court’s building in Skopje was pelted with eggs and toilet paper, ‘sending a message that the Court is treating the Constitution as a toilet paper.’<sup>150</sup> The protesters complained that the Court’s decision was influenced by the governing party, as (i) it came at a time when their party officials were under investigation by a special prosecutor for election rigging as the initiative to change the Law on pardons included election rigging as one of the grounds for pardon granted by the President of the republic, and (ii) the initiative was accepted and decision delivered promptly, in just 19 days, while some cases can languish for months or years before the Court even agrees to consider them. However, the Court in its decision argues that the change of the Law on Pardons made in 2009 with which the President of the Republic no longer has the power to give pardon to convicted criminals for a set of core crimes, including election fraud, rape, trafficking drugs and crimes against humanity, and international law limits the constitutionally guaranteed right and authority of the President and therefore is unconstitutional<sup>151</sup>. Remarkably, the change of the Law on Pardons was made by Prime Minister Gruevski in 2009 when it was claimed that it would strengthen the

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<sup>148</sup> Lazarova Trajkovska (n 74).

<sup>149</sup> Filip Stojanovski, ‘Protesters demand ‘Soiled’ Constitutional Court Justices resign’ (*Global Voices*, 2 March 2016) <<https://globalvoices.org/2016/03/02/protesters-demand-soiled-macedonian-constitutional-court-justices-resign/>> accessed 15 March 2016.

<sup>150</sup> Hristijan Banevski, ‘Protest pred ustavniot sud se bara ostavka od pette sudii’ [Protest in Front of the Constitutional Court Seeks Resignation of the 5 Judges] *24 Vesti* (Skopje, 29 February 2016) <<http://24vesti.mk/protest-pred-ustavniot-sud-se-bara-ostavka-od-pette-ustavni-sudii>> accessed 15 March 2016.

<sup>151</sup> CC decision number U. no. 19/2016-0-1, 16 March 2016 <[www.ustavensud.mk/domino/WEBSUD.nsf](http://www.ustavensud.mk/domino/WEBSUD.nsf)> accessed 30 April 2016.

fight against corruption<sup>152</sup>. Considering that Gruevski repeatedly stated that he stood behind the 2009 decision of the government, the opposing opinion of the government to the initiative to review the Law on Pardons and the statement given by Minister Jashari that the Law on Pardons was in line with the Constitution,<sup>153</sup> it seemed that the decision of the Court to annul the 2009 changes of the Law on Pardons remains against everyone's opinion.

Furthermore, the interviewed Justices and legal professionals consider that output legitimacy is very much related and even pertinent to input legitimacy. How important and effective the decisions of the Court are depends on how much the Court is respected in the system. However, Apasiev argues that the system itself does not give importance to the decisions of the Constitutional Court, as its decisions are published in the Official Gazette after all laws, bylaws and decisions of the government and the ministries are presented. Although the order of publication does not necessarily mean order of importance, 'considering that the Constitutional court protects constitutionality and legality in the institutional and legal setting, one should expect that its decisions are published first, prior the decisions of other organs in the political system of separation of power.'<sup>154</sup> This makes the 'results of the work of the Constitutional Court literally invisible and has direct effect on passivation of Macedonian citizens to initiate review of constitutionality and legality of any act before the Court.'<sup>155</sup>

Furthermore, the output legitimacy of the Court is harmed by the low compliance with the Constitutional Court's decisions. Just by reviewing the case law of the Constitutional Court of Macedonia, we have identified and presented in this working paper several instances when even the Sobranie, the Macedonian Parliament (i.e. the Law on Lustration), the government (i.e. the Law on Health Care) and the municipalities (i.e. the Law on Use of Flags), failed to enforce the Constitutional Court's decisions.

Finally, when analyzing the output legitimacy of the Court's decisions, it is important to take into consideration their enforcement and the effect on solving societal problems. The events in Macedonia in May 2016 depict such a situation. Namely, the Macedonian Parliament called for early parliamentary elections to be held on April 24 and then made a decision to postpone the date to June 5. The elections were called as part of an agreement (i.e., Przino Agreement)

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<sup>152</sup> Zorana Gadzovska Spasovska, 'Ustavniot sud protiv site' [Constitutional Court against Everybody] (*Radio Free Europe*, 15 March 2016) <[www.makdenes.org/content/article/27611214.html](http://www.makdenes.org/content/article/27611214.html)> accessed 15 March 2016.

<sup>153</sup> Ibid.

<sup>154</sup> Apasiev (n 65).

<sup>155</sup> Filipov (n 31).



brokered by the European Union<sup>156</sup> to end the protests against the government of Nikola Gruevski. As this practice is not regulated and is even unprecedented in Macedonia, and considering that only one party submitted electoral lists for the scheduled early elections on June 5, while the summoning of the Parliament with the same composition of MPs was impossible according to the Constitution, the Constitutional Court made an important decision repealing the decision for the dismissal of Parliament and the calling of early parliamentary elections as unconstitutional. The Court's ruling is unprecedented in two respects: (i) it establishes that the decision made by the Parliament to dismiss itself and call for early elections 'is a legal act with universal power as it refers to all citizens that on free elections vote and elect members of Parliament to whom they transfer the sovereignty to decide',<sup>157</sup> and therefore, this decision can be subject to judicial review by the Constitutional Court; and (ii) it determines that 'the situation creates legal uncertainty and violates the rule of law principle which is one of the constitutional values setting the ground for the Court to repeal the decision of the Parliament.'<sup>158</sup>

The ruling itself is rather contradictory. Although the decision of the Parliament is considered a legal act, the ruling interprets that the postponement of the effectiveness of the decision made on January 19, 2016 to April 7, when the Parliament effectively dismissed and set the election date for June 5, cannot be compared or equated with the postponement of the effectiveness of adopted laws or other legal acts by Parliament. Also, it is rather debatable whether the situation resulting from a decision can be deemed in violation of the Constitution although the decision itself is not assessed as unconstitutional. The Constitutional Court ruling to repeal Parliament's decision for early elections, however, led to an effective solution of the constitutional and institutional crises the country was in. The Parliament was summoned; elections were cancelled, and this in essence buried the Przhino Agreement. Hence, the Court also addressed the political will of all actors in Macedonian society and offered the only possible solution to the crisis, as any other option would have had irrevocable consequences on the policy and political design of Macedonia. In that respect, the Constitutional Court acted constructively and defended the Constitution in relation to dominant political values in Macedonian society.

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<sup>156</sup> The Przhino agreement is a political agreement between the main political parties in the Republic of Macedonia directed towards the end of the Macedonian political and institutional crisis in the first half of 2015. It foresees: the participation of the opposition party SDSM in the ministries; the early resignation of prime minister Nikola Gruevski in January 2016 and a caretaker government to bring the country to general elections in June 2016, as well as a Special prosecutor to lead the investigations about the eventual crimes highlighted by the wiretapping scandal. The agreement can be viewed here: <<http://kapital.mk/kapital-integralno-go-prenesuva-finalniot-dogovort-od-przhino/>> accessed 27 February 2016.

<sup>157</sup> CC decision number U. 104/2016-0-1, 25 May 2016.

<sup>158</sup> Ibid.

## 4.

# Conclusions

Constitutional courts play a significant role as a cornerstone in state building and establishing continuity in the socio-economic and political development of societies and their citizens. If constitutional courts were a financial instrument, they would most closely resemble the long-term state bonds which are characterized by a low rate of return at low levels of risk and gradual reform. Overhauling the complete set of functions and rules by which the Constitutional Court operates bears the risk of stripping it from its stabilizing long-term role and infusing a greater degree of risk in the judicial system. Or, in financial terms, it puts the Constitutional Court in the plain field of financial instruments that bare high levels of risk and high levels of return, such as the ones offered by company stocks.

In the case of the Macedonian Constitutional Court, what most experts are calling for is a revolution. The findings of this analysis suggest that reforms are indeed necessary. However, the insistence of faster paced dynamics of the reform of the Constitutional Court is also troubling as it might make the difference between failure and moderate success. One has to have in mind that the Constitutional Court also performs a role of ensuring societal continuity which might be endangered if the Constitution or the Rules of Procedure by which the Court functions becomes the object of perpetual reform and unpredictability. And predictability is important to citizens, businesses and regulators.

Having said that, it is important to note that there is not much of a scholarly discussion in Macedonia on the topic of the Court's role in the country's transition to democracy. The Macedonian Constitutional Court within its competence has the potential to have the role of a negative legislator; however, in its decisions made since the independence, in more than 75% of the cases, the Court was self-restraining by opting not to initiate proceedings or reject the initiatives as ambiguous or inadmissible.

Hence, 'although the Constitutional Court's work has been criticized over time it is important to note that often its decisions had progressive character and contributed towards strengthening of institutions, procedures and processes.'<sup>159</sup> However, the Court had a limited role in the transition of the country to democracy. In some cases, the Court's role was to balance between the protection of human rights and democratic values, i.e., the Lustration Law seemed to impede on human rights, and judicial review of the Law stopped enhancing the transitional

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<sup>159</sup> Lazarova Trajkovska (n 74).

justice in Macedonia. Though the Constitutional Court's two subsequent decisions (in 2010 and 2012) on the Lustration Law were made against the decisions of the parliamentary majorities and governments of the time, they can be seen as transformative, as the Court provided protection of the Constitution and constitutionally protected human rights. However, its decisions also stopped the lustration process, and therefore an important phase in the transition of Macedonian society to democracy was postponed as the revoked articles of the Law made it impossible to be implemented.

Furthermore, the output legitimacy of the Court is limited due to a vicious circle comprised of low compliance with its decisions, low trust levels, the reputation of the Constitutional Court judges and the appointment process, and disincentives to initiate petitions. Such a state of affairs is even further complicated by difficult situations in which the state body that adopts an act executes Constitutional Court decisions but at the same time initiates new procedures for adoption or change of the legal act with the same content as the one repealed by the Court. This in particular weakens the legitimacy of the Court's decisions, especially since this type of measure is being used too frequently to circumvent the jurisdiction of the Constitutional Court.

A well-established media communication strategy is of immense importance to institutions which need to generate high trust and credibility, such as the Constitutional Court. The way the Court handles media communication fuels unnecessary public and expert suspicion and incites negative perceptions of the Court's transparency, independence and openness. To this end, the system of appointment of judges is a number one priority for reform, as it is expected to have multiple effects, such as the increased competence, integrity and, above all, independence of the Court.

In the field of human freedoms and rights, specifically in terms of gender equality, the Court shows rigid interpretations of the laws and has the tendency to follow a more conservative stance bearing its roots from the more conservative ideology held by the party in power but also from the legal state of affairs and traditional values held in Macedonia during the pre-1990s Yugoslavian era. In such a setting, the activism of the Court, especially in the field of the protection of freedoms and rights, has considerable potential that can be used to improve its public image, increase trust, and reaffirm its role as protector of the Constitution. Hence, what can help increase trust and legitimacy of the Constitutional Court is the introduction of constitutional complaint and a new law on the Constitutional Court. The separate law on the Constitutional Court would regulate the status of its judges, basic conditions for the institution of proceedings before the Constitutional Court, legal effects of the Constitutional Court's judgments, etc. Additionally, adopting a more transparent and open media communication strategy that would be executed by communication experts should also help increase the Court's credibility, public respect and trust in its decisions.

The analysis suggests a strong necessity for the reforming of the Macedonian Constitutional Court and its functions but also that there needs to be greater

and louder academic and public discussion about the dynamics of this reform in order to maintain one of the Constitutional Court's main societal functions – continuity. Hence, we are more inclined towards supporting a process of evolution of the Constitutional Court rather than a suggested revolution as it was described as necessary by the legal professionals interviewed for the purposes of this paper and the wider public in Macedonia through the recent protests against the Constitutional Court's decisions. Such evolution would encompass also legal reform, adoption of a Law on the Constitutional Court and better regulation of the scope of protection of human rights, and it would set a clear basis for effective and efficient procedures that would eventually strengthen the transformative and democracy-enhancing role of the Constitutional Court of Macedonia.

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