HELSINKI
COMMITTEE FOR HUMAN RIGHTS OF THE REPUBLIC OF MACEDONIA

The Constitutional Court in the Grip between Political Interests and Human Rights

2016

"This analysis is made possible with the support from the American people through the United States Agency for International Development (USAID) within USAID's project for civil society. The content of the analysis is the sole responsibility of the Helsinki Committee for Human rights of the Republic of Macedonia and does not necessarily reflect the views of the United States Agency for International Development or the United States Government."

The Constitutional Court in the Grip between Political Interests and Human Rights

Publisher:
Helsinki Committee for Human Rights of the Republic of Macedonia**
represented by its
President Prof. Dr. Gordan Kalajdziev

Editor:
Uranija Pirovska

Authors:
Dr. Voislav Stojanovski
Dr. Ljubica Karamandi Popchevski
M.A. Hristina Shulevska
Margarita Caca-Nikolovska

Design & Print:
Gaia Design

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

342.565.4(497.7)"2016"

УСТАВНИОТ суд во стегата меѓу политичките интереси и човековите права / [автори Воислав Стојановски ... [и др.] ; уредник Уранија Пировска]. - Скопје : Хелсиншки комитет за човекови права на Република Македонија, 2016. - 120 стр. : илустр. ; 21 см

Автори: Воислав Стојановски, Љубица Караманди Попчевски, Христина
Шулевска, Маргарита Цаца Николовска

ISBN 978-608-4790-10-5
1. Стојановски, Воислав [автор]
а) Уставен суд - Независност - Македонија - 2016 - Извештаи
COBISS.MK-ID 101474826

HELSINKI
COMMITTEE FOR HUMAN RIGHTS OF THE REPUBLIC OF MACEDONIA

Naum Naumovski Borche 83
1000, Skopje, R. Macedonia

Tel: +389 (0)2 3119 073
Fax: +389 (0)2 3290 469

Web: www.mhc.org.mk
E-mail: helkom@mhc.org.mk

TABLE OF CONTENTS ◆

I. INTRODUCTION

In the past five years, and especially since 2013 onwards, the Constitutional Court of the Republic of Macedonia has marked a decline in the number of received and closed cases, a decline in the number of repealed and annulled provisions from laws and bylaws, a decline in the number of employees, without this triggering a change in the among of funds in the annual budget. According to the annual reports of the Court,[1] the number of cases received is on a constant decline compared to 2011 when 236 cases were received, while 128 cases were received in 2015 (-46%). The comparison based on cases closed in the course of those two years is 231/150 (-35%);, repealing/annulling decisions 32/11 (-66%); and citizens' requests for protection of freedoms and rights 23/13 (-43%). These negative indicators point to an unusual passivity in the work of the Court, a decline in the citizens' confidence, bias towards the policies of the legislative and executive authority and neglect on the part of the state when it comes to the development of the bastion of human rights and promotion of the professionalism of the constitutional judges and the professional service.

In 2015 and 2016, the Constitutional Court was frequently criticized by the professional and general public, and its work was also increasingly subject to media coverage. In circumstances when it is disputable whether the all of the members of the Constitutional Court are from the lines of "distinguished lawyers", their political appointment, disregard for their own previous practice, closing the sessions to the public and disregard for the opinions of the Venice Commission raised reasonable doubts that the Court, instead of being a body protecting constitutionality and lawfulness, had turned into an institution subordinate to the legislative and executive authorities and political parties. This has seriously impaired the independence, impartiality, competence and legitimacy of the Constitutional Court. The problems in the functioning of the Court were also mentioned in the Progress Report on the Republic of Macedonia by the European Commission, which objects to the composition of the Court, its impartiality and the delays in the adoption of the decisions.[2]

The Helsinki Committee is one of the rare organizations in the Republic of Macedonia which has a long-standing, continual experience in the monitoring of court proceedings and sessions. Furthermore, through its programme for free legal aid, the Committee has had the chance to review court records which are an integral part of the cases examined by the Constitutional Court. Consequently, the monitors from the Helsinki Committee were able to observe the proceedings during the Court session from both a scientific and legal aspect, as well as practical point of view. This analysis emerged as a result of the 30 observed sessions of the Constitutional Court in the period from 25 March 2015 until 18 May 2016.

[1] http://goo.gl/6pVzKt
[2] Progress Reports on Macedonia for 2013 and 2014: http://www.sep.gov.mk/data/file/Progres%20report%202013/2013-mk/mk_rapport_2013_MK4_21_10_2013.doc http://www.sep.gov.mk/data/file/Progres%20Report%202014/Izvestaj%20MK_PROV_10_10_2014.pdf

II. ABOUT THE PROJECT

This analysis is the product of the project "Monitoring the Work of the Constitutional Court and Assessment of its Capacity to Act on Constitutional appeals" which was financially supported by USAID - the U.S. Agency for International Development and the Open Society Foundation - Macedonia and was conducted in the period from 21 January 2015 until 20 June 2016.

The main goal of the project was to strengthen the independence, impartiality and legitimacy of the Constitutional Court by monitoring its work and scientific research for the purpose of finding the most adequate system for introduction of the Constitutional Appeal as a new instrument in the Macedonian justice system

The short-term project goals were directed towards:

1.Having the Constitutional Court pay due attention to the provisions from the corresponding regulations referring to the sessions, hearings and decision-making;
2.Increased legal certainty for the citizens whose cases are subject of monitoring;
3.Increased transparency, visibility and accountability of the work of the Constitutional Court; and
4.Providing independent, scientific and comparative research on the best practices for implementation of the constitutional appeal.

The main project activities covered:

1.Monitoring and assessment of the sessions of the Constitutional Court
- the monitors preparing and filling in questionnaires
- analysis of the findings from the questionnaires and drafting reports

2.Free legal aid for the citizens
- meetings with the citizens and taking action at the request for monitoring of the hearings and sessions of the Constitutional Court
- free legal aid and advice when preparing constitutional initiatives/requests for protection of freedoms and rights/appeal

3.Sharing the findings with the public and stakeholders
- publishing an article about each separate session on the web-site of the Helsinki Committee
- reporting through press-releases, monthly reports and posts on the social-media;
- a consultative workshop and a press-conference

4.Drafting a scientific and comparative analysis of the best practices in the implementation of the instrument of constitutional appeal.

III. METHODOLOGY

The Helsinki Committee is a civic association with the highest number of initiatives submitted to the Constitutional Court. This activity - the continual monitoring of the work of the court and the alarming of the public about disputable decisions translated into the present scientific and practical research, made it possible for us to find solutions for the existing and possible future problems related to the work of the Constitutional Court. The following methodology for monitoring of the Court's sessions was prepared for the purposes of this analysis:

Monitoring team
The monitoring team consisted of four monitors - lawyers, two of whom were permanent and two of whom were temporary. The monitoring team was guided by the principles of professionalism, objectivity, impartiality and neutrality. Before entering the courtroom, the monitors identified themselves to the security members guarding the premises of the Constitutional Court. At the very begging of the sessions of the Constitutional Court, the President of the Court noted the presence of the monitors from the Helsinki Committee in the session minutes.

Legal research
Before the start of the section of the project referring to the monitoring of the sessions of the Constitutional Court, the monitoring team carried out legal research on the relevant provisions from the domestic and constitutional law regulating the work of the Constitutional Court. The benchmarks used to outline the scientific and legal methodology for assessment of the sessions were derived from the Constitution of the Republic of Macedonia, the European Convention of Human Rights, the jurisprudence of the European Court of Human Rights, the Rules of Procedure of the Constitutional Court and the Rulebook for Internal Organization of the Professional Service of the Constitutional Court. After the aged of the sessions was announced on the web-site of the Constitutional Court, the monitors located and analyzed the disputed provisions following up with a brief analysis related to the possible unconstitutionality or unlawfulness. The method of legal research was also employed in the preparing of the first, theoretical part of this analysis, as well as in the drafting of the Model of a Constitutional Appeal.

Questionnaires for monitoring court sessions
A questionnaire was drafted for the purposes of the monitoring of the sessions of the Constitutional Court, containing general and specific questions referring to the course of the session and how it was conducted by the President of the Court. The general questions referred to the provisions regulating the structure of the sessions and hearings, while the specific ones referred to the provisions from the laws or bylaws or administrative/court decisions contested before the Constitutional Court. The analysis of the judges' performance was of particular importance in the monitoring, along with the average time necessary to solve the initiatives/appeals, the use of the international standards and the domestic jurisprudence in the decision-making, etc. Each completed questionnaire was separately analyzed in correlation with the remaining questionnaires thus enabling a quantitative and qualitative approach in the drafting of the session reports and this analysis.

Communication with the submitters of the initiatives and requests
This activity consisted of two sub-activities which involved meetings with citizens and taking action at their request to monitor the hearings of the sessions of the Constitutional Court and providing free legal aid and advice when preparing constitutional initiatives or requests for protection of freedoms and rights. When providing legal aid, the project team directed its focus on the basic civil, political, economic, social and cultural rights. Before the legal team began monitoring, the client who had submitted the request was required to submit the entire documentation related to the specific case.

Preparing and sharing the report

This activity consisted of three sub activities which covered publishing an article on each session/public hearing separately on the web-site of the Helsinki Committee, preparing and distributing regular monthly reports and sharing the more relevant announcements and findings with the general public. After the closing of each session, the monitor who monitored the session would write a brief report on the course of the session and the findings after the analysis of the questionnaires, whereby the report was published as a separate article on the web-site of the Helsinki Committee. [3] The articles for each session separately provided better access to data, while the media and the public could rely on a new source of neutral and relevant information on the monitored sessions.

IV. SHORT HISTORY OF THE CONSTITUTIONAL JURDICIARY IN THE REPUBLIC OF MACEDONIA

The constitutional judiciary in the Republic of Macedonia was established with the Constitution of the Socialist Republic of Macedonia from 1963. The position and jurisdiction of the Constitutional Court were regulated with the Constitution,[4] while the procedure and the legal effect of its decisions were regulated by law. Within this period, the Constitutional Court exerted conditionally-repressive a posteriori control over the constitutionality of the laws, while the legislative body retained its right to annul, i.e. to repeal the unconstitutional and unlawful regulations. The Constitution of SRM from 1974 and the Law from 1976[6] introduced minor changes to the competence of the Court and the legal effect of its decisions,[7] yet its position regarding the legislative and executive authority remained unchanged. Hence, the Constitutional Court was only able to establish the non-compliance of the laws with the Constitution.[8]

In 1991 the Constitution of the Republic of Macedonia defined the Constitutional Court of the Republic of Macedonia as a "body of the Republic serving to protect the constitutionality and legality".[9] The position, structure, competence and legal effect of the decisions of the Constitutional Court are restrictively regulated by the Constitution of the Republic of Macedonia, [10] awhile the manner of work and the procedure before the Constitutional Court is regulated by the Court with its own act, in accordance with the Rules of Procedure of the Constitutional Court of the Republic of Macedonia.[11] From the point of view of the relationships of the various holders of power in the organization of state government, according to its constitutional position, the Constitutional Court **does not fall under the system of organization of state power**, but rather constitutes a separate constitutional body with its own status, structure, organization and competence specifically laid down with the Constitution itself - a sui generis body. This position of the Constitutional Court was deemed to be a prerequisite for exercising an independent constitutional-judicial function shielded from political interference.

The expert public is unanimous in its stance that the manner of work and the procedure of the Constitutional Court should have been regulated with a Constitutional Law[12] instead of Rules of Procedure. The modesty and generality of the constitutional provisions has put the principle of "checks and balances" in danger and therefore in a large number of situations the Court was "passive and self-restricted"[13] so that under given circumstances the negative aspects of judicial activism were felt.

[3] http://www.mhc.org.mk/pages/judiciary

[4] According to the Constitution from 1963, the court consisted of a president and six judges with a mandate of eight years each, as well as a possibility for re-election for another eight-year mandate. The Constitutional Court decided on the constitutionality of the Laws of the Republic, the compliance of the bylaws, the local communities' statutes and the companies' statutes with the Constitution and the laws; decided on jurisdiction disputes between the Republic and the local communities and jurisdiction disputes between the state bodies and the bodies of the local communities. Furthermore, the Court was competent to decide on the right to self-governance and other basic human rights stipulated by the Constitution of Yugoslavia. Hence, the Court had a subsidiary jurisdiction which, unfortunately, was not implemented in practice. See: Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006, p. 266

[5] In case the Constitutional Court ruled that the law is not in accordance with the Constitution, the Assembly was obliged to align the law with the constitution within six months as of the publishing of the decision. Otherwise the law would cease to apply and the Constitutional Court would not have the right to suspend the application of such an unconstitutional law.

[6] The Law on the Basics of the Procedure and the Effect of the Decisions of the Constitutional Court

[7] The jurisdiction over the protection of the right to self-governance and other basic human rights were omitted, a possibility for the alignment of an unconstitutional law to be extended by another six months was introduced. The possibility for re-election of the judges was removed, and a provision was introduced that the decisions of the Court and binding and effective.

[8] Constitutional Court, http://ustavensud.mk

[9] Article 108 from the Constitution

[10] Skaric Svetomir, Comparative and Macedonian Constitutional Law, Matica Makedonska, Skopje 2004, p.684

[11] The Rules of Procedure were adopted on 7 October 1992, and have not been changed since. Thus, the constitutional and legal regulation of the constitutional judiciary which applied up to that point was replaced with a broader procedural regulation, which, according to Skaric, significantly undermines the authority and legitimacy of the Constitutional Court in exercising its function. See: Skaric Svetomir, Comparative and Macedonian Constitutional Law, Matica Makedonska, Skopje 2004, p.685

[12] Klimovski Savo, Constitutional and Political System, Prosvetno delo, Skopje 1998, p. 397; Preshova Denis, Reforms of the Constitutional Court, or a Reform in the Awareness? in the: Reform of the Institution and the Significance for the development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p 175

[13] Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006, p.270

Unfortunately, the calls of the expert public through the years for a reform of the Constitutional Court lacked specific proposals and initiatives for a change, not only from outside (through a change in the Constitution), but also from within (a change in the Rules of Procedure and the practice of the Court). [14] It seems that an inert Constitutional Court was to the best interest of the political elites, as well as the constitutional judges who did not wish to give up on the marginal position they had become "accustomed to".[15] The reforms in the area of the constitutional judiciary seemed inevitable, taking into account that the Constitutional Court need not only be the guardian of the constitutional order,[16] but also the "the driving force behind the reform in the legal culture and a guide to the regular courts in the interpretation of the constitutional values".[17]
Due to the space limitations, as well as the goals of this study, this part shall focus on two issues: the constitutionality and legality, as well as the protection of the human and citizens' freedoms and rights that the Constitutional Court is in charge of.

V. COMPETENCE OF THE CONSTITUTIONAL COURT

According to the Constitutional Court, its competence is stipulated solely by the Constitution.[18] In reality, not only does the Constitutional Court stipulate its competence with its Rules of Procedure and its practice, but even takes a step forward in certain cases and practically performs a review of the constitutional text.[19] This has unfortunately led to it being qualified as "Manipulator with the Constitution" in certain cases. [20]

The Constitution provides a list of the competences of the Constitutional Court, and consequently the Court is competent to decide on five groups of issues. One issue that catches the eye is Article 16, paragraph 3 from the Rules of Procedure through which the Constitutional Court expressly distances itself from broader interpretation of the Constitution to take certain actions ("opinion, explanation or intervention before other bodies" which would be in the direction of exercising its function - protection of the Constitution and the constitutional values. [21]

The primary jurisdiction of the Constitutional Court is to provide the hierarchy of the legal norms through normative control of general acts[22] which is exercised as **abstract and a posteriori**, meaning that it is possible only on enforceable acts. The criticism of the work of the Constitutional Court with regards to this issue tackle several aspects. Firstly, as far back as 1996, the "maneuver" around the question whether an act has the character of a general regulation or not, was observed. In that way, the Court declared itself incompetent to decide on the constitutionality of the Conclusion of the Assembly of the Republic of Macedonia, according to which there were no constitutional grounds to start a referendum for early elections, which was strongly disapproved of by the expert public. [23]

[14] The only initiative for a change in the work of the Constitutional Court came in 2006 when the adoption of a Constitutional Law was proposed within the constitutional changes in the legislation. Despite the positive assessment of the Venice Commission, the proposal was not accepted. See: Preshova Denis, Reforms, Reforms in the Constitutional Court or Reforms in the Awareness? in: The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p. 176
[15] The Constitutional Court of the Republic of Macedonia, in the period from 1992 to 2008 acted on 4264 cases for assessment of the constitutionality and legality and 114 cases for protection of rights and liberties. Within the same period of time, the Constitutional Court in Croatia received 44546 cases, and solved 3871 cases in only in 1997. The Constitutional Court in Slovenia settled 6027 cases in 2007, and 1667 in 2006. The highest number of cases were initiated with constitutional appeal. In: Preshova Denis, Reforms, Reforms in the Constitutional Court or Reforms in the Awareness? in: The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p. 189.
[16] It is worth mentioning that the leaders in the transformation of the legal ideology in Eastern post-communist Europe were exactly the Constitutional Courts, and the Czech and Slovenian one appear as most influential in this process. Among other things, they declared constitutional jurisdiction of specific acts in order to protect the individual fundamental rights not only from arbitrary decisions, but also from interpretations "which are in extreme conflict with the principles of justice - such as excessive formalism". See: Karamandi Ljubica Independent Judiciary from an EU perspective, in The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p. 219
[17] Karamandi Ljubica, the Constitution of the Republic of Macedonia and Euro-integrations, Institute of European Policy, Skopje 2013, p. 249
[18] Constitutional Court of RM, http://www.ustavensud.mk/domino/WEBSUD.nsf
[19] Preshova Denis, Reforms, Reforms in the Constitutional Court or Reforms in the Awareness? in: The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p. 199.
[20] TTreneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006, p. 270
[21] Article 16, paragraph 3 from the Rules of Procedure stipulates: "If the initiative requires an opinion, explanation or intervention before other bodies, the Secretary of the Constitutional Court shall notify the applicant in writing that the Constitutional Court does not have the jurisdiction to rule on such issues".
[22] Or, to be more specific, the control of the laws' alignment with the Constitution, the alignment of the collective agreements and other regulations with the Constitution and the laws, as well as the constitutionality of the programs and statutes of the political parties and citizens associations. Various types of normative acts may be contested before the Court, which in a general way regulate certain issues (rulebooks, decrees, decisions, etc of the state bodies and the bodies of the local government, or organizations carrying out public authorizations). In this process, the court accepts competence even when an act which does not comply with the form of a regulation is in question, but obviously regulates certain issues in a general way. Within this competence, the Court may decide on the constitutionality or legality of the act as a whole, or in specific sections and articles, depending on the statements in the initiative and its own assessment. See: Constitutional Court, competence, http://www.ustavensud.mk/
[23] The Constitutional Court declared itself incompetent to decide on the constitutionality of the Conclusion of the Assembly with the explanation that this is not a general act which normatively regulates relations, but an act from the work of the Assembly by which the Assembly decided on a specific issues. In a Decision of the Constitutional Court of RM no. 1290, Official Gazette of the Republic of Macedonia no. 70/96; See: Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006, p 267

With regards of the international agreements, the Constitutional Court sticks to the standpoint that their status in the legal system, from the aspect of its jurisdiction, is insufficiently clear, and the view that they cannot be subject of constitutional assessment prevails in the Court's practice. [24] Changing standpoints in the work of the Constitutional Court have also been observed with regards to this competence. In fact, with decisions from 1996 until 2000, the Constitutional Court declared itself incompetent to decide on the assessment of the alignment of an international agreement with the Constitution.[25] This attitude was then abandoned by the Court, in the same composition, in 2002, [26] and yet in 2005 the Constitutional Court changed its mind again, and went back to the initial standpoint.[27] Claiming that one standpoint is "prevailing" is in the least "unserious" for an authority such as the Constitutional Court which is bound to show integrity in its standpoints and provide strong argumentation for any deviations or when taking new directions. By changing standpoints on issues of highest importance without strong elaboration, the high position and authority that the Constitutional Court (should) have in the country's legal order are brought into question[28]

Furthermore, the Constitutional Court's failure to explain qualifying certain laws as "systemic" has been observed in light to the Court's practice of having them serve as a benchmark when establishing the non-constitutionality of contested laws, taking into account that the Constitution distinguishes between laws solely according to the majority necessary for their adoption. [29]

An exceptionally positive element that has to be mentioned is the evolutionary approach of the Court regarding the practice of the European Court of Human Rights in Strasbourg. In fact, in 2006 the Court finally introduced the jurisprudence from Strasbourg[30] "in the game" and in its subsequent decisions it clearly broadened the pool of sources of law in the Republic of Macedonia.[31] This is one example of a positive breakthrough on the part of the Court from its passive position and role as a subsidiary legislator. Unfortunately, our legal system neither offers the mechanism, nor the practice of monitoring the decisions of the Constitutional Court, because otherwise, the need to expand the pool of sources of law by means of legal provisions would have been unnecessary.[32]

The Constitutional Court is competent to provide immediate protection of the constitutional freedoms and rights of humans and citizens.[33] The subjects of assessment within this competence are the individual acts and actions of the bodies of the public authority that the citizen believes have violated some of respective constitutional rights. [34] Limiting this competence only to the listed freedoms and rights has proved to be a serious obstacle for a more substantive positioning of the Court towards immediate protection of the other constitutional freedoms and rights of humans and citizens as well. First of all, the criterion that the selection of these rights was based on remains an enigma for the professional public, which, at the same time, emphasizes that by recognizing active legitimacy only to the "citizens" and not "humans" in its Rules of Procedure, the Court has introduced an unconstitutional provision in the act governing its work. [35] Consequently, the questions arises: " quis custodiet ipsos custodes?" (who will guard the guardians themselves?). The answer boils down to their personal sense of integrity, awareness, consciousness, sense of responsibility, but without any specific mechanisms for protection against arbitrary action.

[24] Constitutional Court, competence http://www.ustavensud.mk/
[25] The motivation was that such an assessment is carried out by the Assembly in the ratification process. See: Decisions E.no. 230/1996 and E.no.178/2000
[26] The Court "assessed that the Constitution gives it the possibility to examine both the formal and substantive side of the laws for ratification of international agreements" in Decision E.no. 140/2001
[27] Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006, p. 268
[28] The expert public highlights that the Constitutional Court failed to answer the question about the status of international agreements which are not subject of ratification, as well as the conditions for direct enforceability of the ratified international agreements. In: Preshova Denis, Reforms, Reforms in the Constitutional Court or Reforms in the Awareness? in: The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p. 196
[29] Preshova Denis, Reforms, Reforms in the Constitutional Court or Reforms in the Awareness? in: The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p.193
[30] Unfortunately, it has to be noted that this was done nearly 10 years after the accession to the European Convention for the Protection of Fundamental Human Rights and Freedoms which is a negative indicator of our legal culture and its sluggish transformation. See decisions E.no. 31/2006, E.no.28/2008, E.no.104/2009
[31] The Decision from 2008 E.no.104/2008 for non-implementation of a procedure for assessment of the constitutionality deserved a special place in the review of the practice of the Constitutional Court. The applicant contested the provisions from the Law on Courts which introduced a new legal remedy - establishing a violation of the right to a trial within a reasonable time, and in essence the Strasbourg case law as a source of law in the Republic of Macedonia was also contested. What is most important is the Constitutional Court emphasizing that the "text of the Convention is inextricably related to the interpretation of the European Court of Human Rights. In the implementation of the Convention, the Supreme Court will by no means achieve its real implementation if it sticks to the textual context and its interpretation outside of the jurisprudence of the Court in Strasbourg. Practically, this means that if the domestic Court interprets the provision from the Conventions literally, without taking into account and gaining insight into the jurisprudence of the Court in Strasbourg and its principal interpretative stances, it will not be able to provide protection of the law". In: Karamandi, Ljubica, the Constitution of the Republic of Macedonia and Euro-integrations, European Policy Institute, Skopje p.221
[32] For example Article 2 from the Law on Civil Liability for Defamation
[33] The Constitution singles out the freedom of belief, conscience, thought and public expression of thought, political association and action and the prohibition of discrimination on the grounds of sex, race, religion or national, social or political affiliation.
[34] Not only a decree may be a contested subject, but also a court decision of any instance.
[35] Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006, p.271

VI. LEGAL EFFECT OF THE DECISIONS

The types and legal effect of the decisions of the Constitutional Court are in essence laid down in the Constitution,[36] with some significant aspects of the legal effect being laid down in the Rules of Procedure as well. The Decisions of the Court are final and enforceable, they have an **erga omnes** effect and no legal remedies are allowed against them. The decisions of the Court produce legal effect with their publishing in the Official Gazette of the Republic of Macedonia". The legal effect of a repealing decision is **ex nunc** meaning that the repealed normative act is solely eliminated from the legal order, while the effect of an annulling decision is **ex tunc** and aims at not only eliminating the unconstitutional or unlawful normative act from the legal order, but also opens up a possibility for amendment of an individual act adopted on grounds of the annulled act at any time as of the day of its coming into force. [37]

In cases of decisions for protection of freedoms and rights violated with an individual act or effect, it is first established whether there has been a violation of the freedoms and rights, and based on that decision the Court either annuls the individual act, i.e. prohibit its effect, or decline the request. The effect of the decision is **inter partes**. In its decision, the Court also specifies the manner of eliminating the consequences of the implementation the individual act.

According to the Rules of Procedure, the Constitutional Court monitors the enforcement of its decisions, and, when necessary, may demand from the Government to provide their enforcement. Otherwise, the obligation to enforce the decision lies primarily with the adopter of the repealed or annulled act. When it comes to repealing or annulment of normative acts, according to the natural order of things, the Court's decision is, so to say, self-enforceable - the normative act is no longer in the legal order, and any referral to it when deciding on specific cases is plain unlawfulness. Worse **problems may occur, and sometimes have already occurred in practice, when the adopter of the act continues adopting acts with the same content**, or when the bodies refuse to acknowledge the consequences of the repealing or annulling decisions on the individual acts that need to be changes, or the enforcement of which needs to stop. In the latter case, the Government may provide efficiency in the enforcement of the Court's decision, but **the problems are not so simple when it is exactly the Government which avoids the enforcement of the decision by adopting a new act with the same content as the repealed or annulled one.** The Constitutional Court confirmed that there had been problems in the enforcement of the decisions, which has however, been an exception.[38]

It must, by all means, be mentioned, that a strong instrument for enforcement of the decisions of the Constitutional Court are the provisions from the Criminal Code which stipulate severe penalties (five, i.e. ten years of imprisonment) for failing to enforce a Court decision. Unfortunately, we have no data as to whether there have been cases of initiating proceedings for criminal liability and their outcome, although it is certain that in conditions of consistent implementation of the laws, this could have a strong warning effect.

The expert public criticizes that in a large number of cases, the decisions of the Constitutional Court are insufficiently elaborated, not supported with facts and unconvincing.[39] This is an exceptionally important aspect, because the absence of public trust and support is one of the indicators pointing to the of reform in its work.

[36] According to Article 112 from the Constitution, the Constitutional Court shall annul or repeal a law unless it is in accordance with the Constitution, or shall annul or repeal another regulation, unless it is in accordance with the Constitution or another law. The decisions of the Constitutional Court are final and enforceable. Otherwise, the Constitutional Court adopts a decision when it decides on the merits of any of the issues under its competence. On certain issues of procedural nature, the Court adopts decisions and conclusions.

[37] This retroactive effect of the annulling decision is conditional upon presenting the subjects' legal interest for amendment of the individual acts within six months as of the day of announcement of the Court decision, and the adopter of the individual act is obliged to amend it.

[38] Constitutional Court, legal effect of the decision, http://www.ustavensud.mk/

[39] See: Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006 pp 269 - 274

VII. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

The proceedings before the Constitutional Court are fully regulated with the Rules of Procedure of the Court which stipulates that the Court conducts the matters under its competence at a session with all members present, and adopts decisions with a majority vote.

The procedure for **assessment of the constitutionality and legality** is initiated with a Court's decision upon an initiative submitted by anyone, whereby the Rules of Procedure do not stipulate proving the legal interest of the applicant. The Rules of Procedure also provide a possibility for the Constitutional Court itself to start a procedure at the initiative of any judge, i.e. assess the constitutionality and legality of the provisions from the regulation which are not contested in the initiative, whereby this possibility has been taken advantage of on several occasions,[40] although there is no detailed data regarding the quality of utilization of this possibility. The initiative is rejected if it is not under the Court's competence, the Court has already decided on the same legal matter, or if there are other procedural obstacles (The Rules of Procedure do not specify which those procedural obstacles may be).

The initiative should necessarily be drafted in an adequate format, i.e. the contested act needs to be precisely singled out, along with the reasons why the act is contested, which constitutional or legal provisions are violated with the contested act and who the initiator is.

This procedure consists of two phases: preliminary proceedings and a session. The preliminary proceedings cover the assignment of the case to the professional associate and judge,[41] and it is their duty to take various activities within relatively short time spans (10 days, i.e. 3 days if the initiative is a call for protection of the freedoms and rights laid down in the Constitution), a short deadline for the institutions (30 days) to respond to the request, and an obligation for any party providing data to the Constitutional Court, to provide data and notifications. It remains unanswered whether any party has refused to provide data to the Constitutional Court, and in case there is such an occurrence, what is the practice with the obtained answers i.e. what deadline they are provided in, whether they contain all of the matter that the proposer referred to in the initiatives, etc.

The Rules of Procedure provide the possibility to invite the participants in the proceedings and the stakeholders to consultative meetings in order to collect notifications and explanations. The Rules of Procedure stipulate a three-month deadline as of the date when case is set in motion, for completion of the preliminary proceedings, i.e. 30 days for protection of the freedoms and rights laid down in the Constitution **the question arises of who decides when to put the case in motion, what the principle that certain cases are given priority is, and whether the deadlines stipulated in the Rules of Procedure are met.** The preliminary procedure finishes by submitting a report for a session,[42] or notification to the Court about the course of the proceedings.

The Rules of Procedure stipulate the scheduling of the sessions to be done by the President of the Court, not later than 7 days before the scheduled date (less than this for urgent cases), in writing, along with submission of the reports and the other materials. The session starts with an presentation of the judge-rapporteur, i.e. the judge from the preliminary procedure, a deliberation is opened on all contentious legal and factual issues, and the decisions are adopted with a majority vote from the total number of judges, unless otherwise stipulated. The judge who voted against or has a different stance on the legal grounds may elaborate her/his opinion in writing as a dissenting opinion. Minutes are kept in the course of the session, while certain constitutional and legal issues are also recorded in writing. *Who decides whether the session will be recorded? What is the practice, i.e. how often are sessions recorded? Considering the importance of this body, and taking into account the technological development we have achieved, it is recommended to have all of the sessions recorded.*

[40] Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006 p.269

[41] The case is assigned to a professional associate, and at the same time to a judge, in cases when the initiative contests the constitutionality of a law, program or statute of the political party.

[42] Article 23, paragraph 3 from the Rules of Procedure stipulates that "The report of the session includes in particular: when the initiative was submitted and what request was lodged, what disputable legal and factual issues have emerged while reviewing the case, what preparations have been done, presentation of the constitutional judicial practice, by default, an opinion and proposal how to deal with the submitted request".

In Article 28, the Rules of Procedure stipulate that the Constitutional Court should adopt a decision to stop the enforcement of acts or actions taken based on a regulation the constitutionality of which is assessed, in case there is a risk of serious consequences which would be hard to reverse.

Optional stages for such a procedure are the preliminary session and the public hearing. The Rules of Procedure stipulate that the preliminary session shall be held upon a decision of the Constitutional Court, which means that it may be convened by the President of the Court and professional bodies and organizations, and scientists and professionals may be also invited in order to clarify the facts and legal circumstances of certain cases, whereas the judges can ask questions and provide their opinions and comments.

There are no stricter rules for holding a preliminary session, while when a public hearing is in question the media should be informed. The first thing that catches the eye when it comes to holding a public hearing is that the Constitutional Court decides on this at a session, which means that it is held for issues of exceptional importance. The Rules of Procedure stipulate what the judge-rapporteur's report should contain, and deadlines are also stipulated limiting the time when the invitation to the judges and participants in the proceedings is to be submitted,[43] meaning that the time necessary for the participants to get prepared for the public hearing is taken into consideration. What is also important is that the Rules of Procedure stipulate the presence of at least five judges at the public hearing, the venue is stipulated to be outside the premises of the Court along with the possibility to present evidence, or postpone the procedure for a definite or indefinite period of time for the purpose of collecting necessary data. A particularly important feature is keeping minutes, which may be in the form of shorthand notes, or a recording.

The Rules of Procedure do not stipulate what type of cases would require a preliminary session or a public hearing, i.e. this is up to the Constitutional Court to decide. *How often preliminary sessions and public hearings are convened is certainly one of the indicators of the openness of the Constitutional Court to the expert and wider public, to the aptitude for more comprehensive analysis of the case and adoption of the right decision, and at the same time also the aspiration to gain public support as the true protector of the constitutionality and legality. With the technology available nowadays, recording of public hearings should be mandatory, considering the fact that the public hearings are obviously stipulated for cases of particular interest. Certainly, it is recommended that it should a mandatory stage in the proceedings for assessment of the constitutionality and legality.*

The Counseling and voting is the final part of the procedure for these proceedings when the public is not involved. It requires the presence of the judges who did not take part in the public hearing i.e. the session, and a separate record[44]is kept which is then sealed and may be opened only at the request of the Court. *The Rules of Procedure, unfortunately, do not stipulate in which cases minutes are to be kept and who decides about it (the President, or at a session) and it is also interesting to know whether any minutes have been kept so far, to what end, etc.*

Protection of the freedoms and rights of people and citizens

The procedure for protection of the freedoms and rights of the human or citizen,[45] may be initiated at the request (constitutional appeal) by anyone who believes that some of the freedoms and rights cited in Article 110 item 3 of the Constitution have been violated with a final or effective act or action. This type of competence allows for contestation not only of the administrative, but also judicial decisions and acts of the holder of public authority, and at the same time, submitting such a request does not call for previous exhaustion of all the legal remedies against a final or effective act.

[43] Not later than 10 days before the hearing is scheduled, i.e. less than that in case of urgency.
[44] The minutes on the deliberation and voting shall contain: the date of the deliberation and voting, the names of the judges who took part in the deliberation and voting, summary of the deliberation, the result of the voting, the adopted decision and the names of the judges who voted in favour of and against of the decision. The written motivation behind any dissenting opinions shall be attached to the minutes.
[45] According to Decision E.no. 29/97, the citizens may demand protection of their rights, but not the rights of others. See: Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law "Iustinianus Primus, Skopje, 2006, p. 271

The request should be drafted in an adequate form[46] and within the prescribed subjective and objective deadline (within two months as of the day of submission of a final or effective individual act, i.e. as of the day of announcing the action which caused the violation, but not later than 5 years after the action took place). This wording of the provisions implies that the Constitutional Court serves to protect the freedoms and rights solely when they are violated by a final and effective act.[47]

The proceedings are considered initiated with the submission of the request, so the only remaining step is for the Court to provide a substantive response to the request. The request is submitted for response to the adopter of the individual act within 15 days and a report for a session is submitted or the Court is informed about the course of the proceedings not later than 30 days as of the day when the case started to be processed.

By default, the Constitutional Court decides on the protection of the freedoms and rights based on a public hearing where the parties in the proceedings are invited, as well as a mandatory invitation for the Ombudsman, and, when necessary, other persons, bodies or organizations may also be invited. For the purpose of protection of the freedoms and rights, the Court may annul the individual act, prohibit the action causing the violation or reject the request. If the Court establishes a violation of a right, in its decision it may stipulate the manner of eliminating the consequences of the application of the individual act or action violating the said rights and freedoms.

This procedure is based on the principles of priority and urgency. In practice, a relatively low number of requests for protection of freedoms and rights have been observed, most of which have been rejected for various reasons.[48]

[46] It should specify the act or action violating the freedoms and rights, the facts and evidence in support of this, the reasons why the protection is sought and other relevant data.

[47] In Decision E.no. 168/97, the Constitutional Court states that "it decides on protection of freedoms and rights solely when they are violated by a final or effective individual act, while the acts of the public prosecutor are not an act which is final or effective individual act deciding on the freedoms and rights i.e. denying or limiting certain freedoms and rights".

[48] No competence over certain rights, expiry of the subjective and objective deadline since that request had been decided on etc.

VIII. WHO HAS INFLUENCE OVER THE COURT AND IN WHAT WAY

The selection of judges and the financing of the Constitutional Court are the two important issues that can exert influence over the Constitutional Court. The legislator has stipulated the Court to be composed of 9 judges with a long mandate of 9 years which needs to provide a guarantee for independence - a mandate longer than that of the House of Representatives,[49] incompatibility with doing any other public office and profession or being a member of a political party, as well as immunity that the Constitutional Court itself decides on.[50]The absence of political responsibility in the constitutional judges (should) serves as a chief guarantee of their independence, [51] but it seems that it is not sufficient for gaining public support and accepting the Constitutional Court as the true protector of the Constitution.

The Parliament is the body tasked with the election of the judges of the Constitutional Court, electing six of them with a majority vote, and three with the so-called "Badinter majority".[52] The Constitution clearly appoints the President (two judges) and the Judicial Council (two judges), as authorized proposers of four judges. The Constitution does not stipulate who the proposer should be for the remaining five judges, so that they are proposed by Parliament through its Commission on Election and Appointment. [53] This certainly is one way to influence the judges since they are proposed and elected by the same body - the Assembly, and it must be noted that most often the ruling party/coalition gives an absolute majority of votes to those candidates. For those reasons, the expert public has been calling for reforms in the procedure for election of judges for a long time.[54] *The possibility to entrust the proposing of members of the Constitutional Court fully under the authority of professional bodies (Council of Public Prosecutors, Faculties of Law, MANU etc.) and to have the Assembly elect a judge from a list of proposed candidates may be taken into consideration.*

The only election criteria, according to the Constitution, is to have a judge from the lines of "distinguished lawyers".[55] Unfortunately, the Constitution was not amended in this part, nor was any practice distilled in the election of judges which would clarify what the standard of "a distinguished lawyer" (e.g. years of experience, academic titles, scientific activity, international experience etc.) would assume. The legislator has left open a wide space for manipulation with the conditions for election of judges in the Constitutional Court and at the same time the Parliament of the Republic of Macedonia has not managed to distill the standard for a "distinguished lawyer". Interventions in this issue are also necessary, so it is proposed that "constitutional judges be elected from the ranks of lawyers who distinguished themselves with their scientific, research and professional activities; from the lines of judges at the highest, Supreme Court, lawyers, public prosecutors from the Public Prosecutor's Offices in the Republic of Macedonia and university professors who have at least 15 years of working experience in the area of law, and who did not hold any appointed or elected office in the previous four years". [56]

The second aspect that exerts direct influence on the work of the Constitutional Court is the financing, i.e. the dependence on the state budget that the Constitutional Court has no major influence over, as it emphasizes every year in its annual report. By studying the annual reports published on the web-site of the Constitutional Court it can be concluded that the Court does not have sufficient funds for adequate investments (personal or material) which would raise the quality of its work to a higher level. And being familiar with the procedure for adoption of the annual State Budget, it becomes clear that the work of the Constitutional Court in the material sense of the word, mainly depends on the Government's will, as a proposer, and the Parliament, as the body which adopts the Budget. The financial dependence of the Constitutional Court was observed in 2001 when there were restrictions by the Ministry of Finance, which was assessed as a way to "discipline" the Court's members.[57]

[50] The Court elects the president from the line of judges for a period of three years, without the right to re-election.

[51] Preshova Denis, Reforms, Reforms in the Constitutional Court or Reforms in the Awareness? in: The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p. 174

[52] Three judges are elected with a majority vote by the total number of MPs, whereby a majority vote from the total number of MPs who belong to the non-majority communities in the Republic of Macedonia is necessary.

[53] The existing structure of the Election and Appointment Commission is 12 members and their deputies, a president and his/her deputy. 2 of those 26 people are lawyers, while the remaining ones are electrical engineers, economists, journalists doctors of medicine, mechanical engineer, managers, an actor etc.

[54] Preshova proposes the election to be carried out after the Hungarian model, i.e. with a two-third majority of the votes from the total number of MPs and at the proposal of the Parliamentary Commission composed of an equal number of representatives of both the parliament majority and opposition, which would necessarily lead to collaboration and consensus. See: Preshova Denis, Reforms, Reforms in the Constitutional Court or Reforms in the Awareness? in: The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, p. 181

[55] Article 109 of the Constitution

[56] Preshova Denis, Reforms, Reforms in the Constitutional Court or Reforms in the Awareness? in: The Reform of the Institutions and its Significance for the Development of the Republic of Macedonia, Book 5, MANU, Skopje 2009, pp.182-184

[57] See: Treneska-Deskoska Renata, Constitutionalism and Human Rights, Faculty of Law, Iustinianus Primus, Skopje, 2006, p. 270

IX. GENERAL INFORMATION ABOUT THE CONSTITUTIONAL COURT

1. Judges' curriculum vitae

Elena Gosheva - President

Born in 1948, in the village of Orizari, Kochani. In 1975 she graduated from the Faculty of Law at the "Ss. Cyril and Methodius" University. After her graduation in 1975 she started working as an intern for the District Public Prosecutor's Office in Skopje where she processes criminal reports and cases of the first and second instance until 1977, when upon passing the State Bar Exam she started working as a professional associate. In 1984 she was elected Deputy of the District Public Prosecutor in Skopje, where she worked on criminal cases until 1987. She continued doing the same line of work for the Primary Public Prosecution, as Deputy Prosecutor, until 2002 when she was elected Deputy of the Senior Public Prosecutor in Skopje. In 2008 she was elected member of the Council of Public Prosecutors of the Republic of Macedonia by the public prosecutors from the jurisdiction of the Higher Public Prosecution Skopje and was elected the first president of this institution, an office she served until 2010.

Ismail Darlishta

Born in 1964 in Skopje, an Albanian by nationality. He finished primary and secondary education in Skopje, and then in the school year of 1984/85 he enrolled at the Faculty of Law at the University in Prishtina. He graduated in 1989, and passed the State Bar Exam in 2001 in Skopje. After his graduation, in the period 1990-1996 he worked as a councilor at the Assembly of the City of Skopje.At the same time, in the period 1996-2000 he worked as a deputy member of the State Election Commission and an independent officer in the Municipality of Centar in Skopje. He worked as deputy Managing Director at the Civil Servants Agency in the period 2000-2002. In the period between October 2002 and October 2003 he was appointed Minister of Justice of the Republic of Macedonia. Starting from 20 July 20015 until 31 December 2006, he worked as a member of the State Judicial Council. He was elected judge at the Constitutional Court of the Republic of Macedonia on 31 July 2008.

Dr. Natasha Gaber-Damjanovska

Born in 1962 in Skopje. She graduated from the Faculty of Law at the University "Ss. Cyril and Methodius" - Skopje, in the school year of 1984/85 with a grade point average of 9, 14. She got her Master from the Law Faculty at the University "St. Cyril and Methodius", Skopje, Department of Political and Legal Science earning her the academic title of Master of Political and Legal Studies in 1990. She got her PhD at the Institute of Sociological, Political and Legal Research in Skopje in 1995. From 1985 to 2008 she worked at the Institute of Sociological, Political and Legal Research in Skopje. She was elected judge in the Constitutional Court in 2008. She acquired the academic title of Scientific Adviser in 1997, was re-elected for the same title in 2006. Gained academic title of full-time professor in 2006. She taught at the Institute of Sociological, Political and Legal Research and the American College - Skopje. She speaks fluent Greek and English and intermediate French and Italian. She was a member of the Management Board of the Macedonian Center for International Cooperation from 1991 to 2009. She has been involved in a large number of scientific projects and has authored or co-authored a line of professional and scientific studies, strategic documents, evaluations, research papers and analyses.

Dr. Gzime Starova

Born in 1946 in Skopje. An Albanian by nationality. She graduated at the Faculty of Law "Iustinianus Primus" in Skopje. She started working at the Skopje Faculty of Law in 1971, first as an trainee at the Department of Administrative Legal Sciences, and as of 1973 as a teaching assistant in the subject of Labour Law and Social Insurance. She completed her post-graduate studies at the Faculty of Law in Skopje in 1978. She obtained her PhD degree at the Faculty of Law in Ljubljana, Republic of Slovenia in 1991. In 1992 she was appointed a Docent at the Faculty of Law in Skopje. In 1997 she was appointed an Associate Professor, and in 2002, she was appointed a Full-time Professor. In 2001 she started working as a Professor of Labour Law and Social Insurance at the Faculty of Law at the Southeast European University in Tetovo, where she teaches in Albanian and Macedonian. In the course of two school years she was engaged as a professor at the Women's Studies Court organized by the Alliance of Women's Organizations of the Republic of Macedonia, on the subject of Women's Rights - Human Rights. In the course of 2004, as a visiting professor, Dr. Gzime Starova held lectures at the Faculty of Law under the "Rene Descartes" University in Paris, France, while in 1999, she was invited to hold lectures from the area of Labour Law at the Faculty of Law under the University in Calgary, Italy. Within the Tempus programme, during 2001 she had a study visit to the Faculty of Law in Florence, Italy. Dr. Gzime Starova has participated in a number of consultations, meetings, conferences and debates from the area of human rights, especially the rights of the individual organized by governmental institutions, non-governmental institutions, the Union and the Council of Europe. In the period between 1992 and 1994, she was a member of the Management Board of the Pension and Disability Fund of the Republic of Macedonia. In the course of 1998 and 1999, as a representative of the Republic of Macedonia, she was a member of the Committee of Experts on Local Social Services of the Council of Europe. In the period from 2004 to 2008 she held the office of deputy chairperson of the University Senate of the "Ss. Cyril and Methodius" University in Skopje. She is a member of the Board of the South-Eastern European University in Tetovo. In 2004, Dr. Gzime Starova won the prestigious decoration of the French government, the Academic Palm, for her

extraordinary contributions in the field of the university and scholarly activity with a wider international relevance. That same year, the U.S. Department of State proclaimed her to be one of the six most successful women in the Republic of Macedonia, a recognition which was awarded to her for her achievements in the field of education and science. In November 2005, Dr. Starova won the prestigious state award for her achievements in the field of education in the Republic of Macedonia, "St. Clement of Ohrid". Dr. Gzime Starova has authored a number of scholarly and professional papers in the field of labor law and social insurance, as well as studies with comparative perceptions of issues related to these fields internationally, and especially in a European context.

Vladimir Stojanoski

Vladimir Stojanoski was born on June 16th, 1962 in Bitola. He graduated from the Faculty of Law in Bitola, in 1988. He passed the State Bar Exam in Skopje in 1991. On 13.09.2010 he was elected Judge of the Supreme Court of the Republic of Macedonia. He first worked as an expert associate, then an advisor and state advisor at the Government of the Republic of Macedonia in the period from 1992 – 2002. In 2002 he started working as Assistant Director for financial and legal matters in the Fund of Agriculture; in 2004 he started working at the Ministry of Agriculture, Forestry and Water Supply as Assistant Director of the Sector for Financial Support for Agriculture and Rural Development and in 2006 as a Director of the Bureau for Court Expertise. In 2007 he was elected Judge at the Administrative Court of the Republic of Macedonia. On 13.09.2010 he was elected Judge of the Supreme Court of the Republic of Macedonia. On April 14 2011 he was elected Judge of the Constitutional Court of the Republic of Macedonia. Other working experience: Member of the Commission for final exam at the Academy for Training Judges and Public Prosecutors (November 2008); Member of the Legal Council of the Government of the Republic of Macedonia (June 2001), International certificate for public administration – Programme for Organization of the Government and the Office of the President by the Government of the UK (November 2001); Centre for European Constitutional Law (October 1999); Government of the Republic of Macedonia – member of the Commission for Political System (1998-2002); Member of commissions for drafting legislation in the area of the judiciary, civil engineering, spatial and urban planning, agriculture and rural development and in other areas.

Sali Murati

Born in 1966 in v. Vrapchishte, Gostivar. He is Turkish by nationality. He graduated from the Faculty of Law at the University of Belgrade in 1991, and passed the State Bar Exam in 2005.

From 1993 to 2005 he worked in the Bureau for Legal and Economic Services in Gostivar as a lawyer. In the period from 2005-2012 he worked as an attorney in Gostivar.

After his graduation he got actively involved with the legal issues in the area of constitutional law, rights of the communities, the freedom of thought and religion and the international private law. He has published numerous legal articles in different journals in the country and abroad. He has participated in more than 15 international conferences in a various countries abroad. He has particularly worked on the problems of non-majority communities in the Republic of Macedonia. In that context, in 2006 he won the prestigious media award – Person of the Year "Kutluk Veli" and in 2007 he won the award of the Association "Adeksam" Gostivar for his work and outstanding contribution to the integration and development of the rights of Turks in the Republic of Macedonia.

Nikola Ivanovski

Born in Skopje in 1960. He graduated at the Faculty of Law in Bitola in 1983 and passed the State Bar Exam in 1985. He started working as an intern in the District Trade Court Skopje, and later on became a professional associate in the same Court (1984-1988); From 1988 until 1996 he worked as an investigative and enforcement judge in the Primary Court Skopje 1 – Skopje. He worked as an attorney in the lawyer's office in Skopje up to 1999 when he started working as a criminal judge in the Primary Court Skopje 1 – Skopje. Afterwards, in 2008, he was elected for a member of the Council of Public Prosecutors of the Republic of Macedonia. He was member of the Project Management Board of the Project for Further Consolidation of the Institutional Capacities of the Academy for Judges and Public Prosecutors", financed by the European Union. He was elected judge of the Constitutional Court of the Republic of Macedonia on 1 June 2012.

Jovan Josifovski

Born in 1948 in Tetovo. He graduated from the Law Faculty at the University "Ss. Cyril and Methodius" - Skopje in 1974. In 1975 he started working as an intern in the Republic Secretariat for Legislation and Organization, while in 1979 he got permanently employed as an officer in the Republic Secretariat for Legislation and Organization. In 1983 he was reassigned to the position of advisor in the Republic Secretariat for Legislation and Organization. From 1983 to 1985 he was appointed Head of the City Committee for Public Utilities and Traffic where he worked on normative activities under the competence of the City of Skopje.

From 1985 to 1990 he worked as an Advisor in the Legislative Committee of the Assembly of the Republic of Macedonia. In 1990 he was appointed Advisor of the Assembly of the Republic of Macedonia performing the duties and tasks of an adviser to the Legislative Committee of the Assembly.

In the 1992 he was appointed Secretary of the Legislative Committee. In 1997 he was appointed Independent Advisor in the Department of Working Bodies of the Professional Service of the Assembly of the Republic of Macedonia. In 1999, he was appointed by the Assembly of the Republic of Macedonia as the Deputy Secretary of the Assembly of the Republic of Macedonia, and served this office until December 4, 2002.

In 2003 he obtained the status of a civil servant and was assigned to a job with the title of advisor to the Commission on Political Systems and Inter-Ethnic Relations of the Assembly of the Republic of Macedonia. He has participated in several election cycles as a person hired in the auxiliary working body of the State Election Commission when implementing the Parliamentary Elections in 2002, the referendum in 2004, the Presidential Elections in 2004 and the Local Elections in 2000 and 2005. In 2012, the Assembly of the Republic of Macedonia adopted a decision that his office as member of the State Electoral Commission has been terminated before the expiration of his mandate due to the fulfillment of the conditions for old-age retirement. He has held the position of a judge in the Constitutional Court of the Republic of Macedonia since 24 December 2012.

Vangelina Markudova

Vangelina Markudova was born in 1956 in Gevgelija. She graduated from the Faculty of Law in Skopje – judicial stream, and passed the State Bar Exam at the Ministry of Justice. She has worked in the Executive Council of the Municipality of Valandovo (1981-1984); intern and expert associate at the Municipal Court Gevgelija (1984-1986); Judge at the Municipal Court Gevgelija (1986-1996). She was elected judge at the Skopje Primary Court I Skopje in 1996 where she had been working exclusively on criminal law cases. Upon the establishing of the Department for Combating Organized Crime and Corruption, from 2007 until 2013 she was working on cases of organized crime and corruption. She was elected judge of the Constitutional Court in November 2013. She speaks intermediate French.

2. Professional service

The professional and other logistic activities necessary for the functioning of the Court are pursued by the Court's Professional Service. The Professional Service is headed by the Secretary General. According to the web-site of the Constitutional Court,[58] the service consists of 20 civil servants, 9 of whom have the title of state advisors. The professional service performs the professional, analytical, informative, archival, administrative and technical issues. The professional and analytical issues are focused on theoretical, comparative and empirical studies of specific issues (problem approach), the informative and archival issues focus on collecting, classifying and systematizing professional material (systemic approach), while the administrative-technical issues focus on preparing, keeping records, distribution etc. related to the Court's materials (formal approach). Until 2014 the Court had its spokespersons for public relations, but this position was terminated by the new majority of judges. The competences were transferred to the new Secretary General.

3. Budget

The Budget of the Constitutional Court for 2016 amounted to around 585,000 евра,[59] and with the budget rebalancing from July 2016, it was increased to about 600,000 EUR. Although the highest in the past 5 years, this amount is still insufficient bearing in mind the importance of this institution for the legal order of this country. According to the annual reports of the Court 75% of the budget is spent on the expenditures for the employee's salaries.

[58] http://goo.gl/Lp90MM
[59] Law on Implementation of the Budget of the Republic of Macedonia for 2016 "Official Gazette" of the RM no. 209/2015.

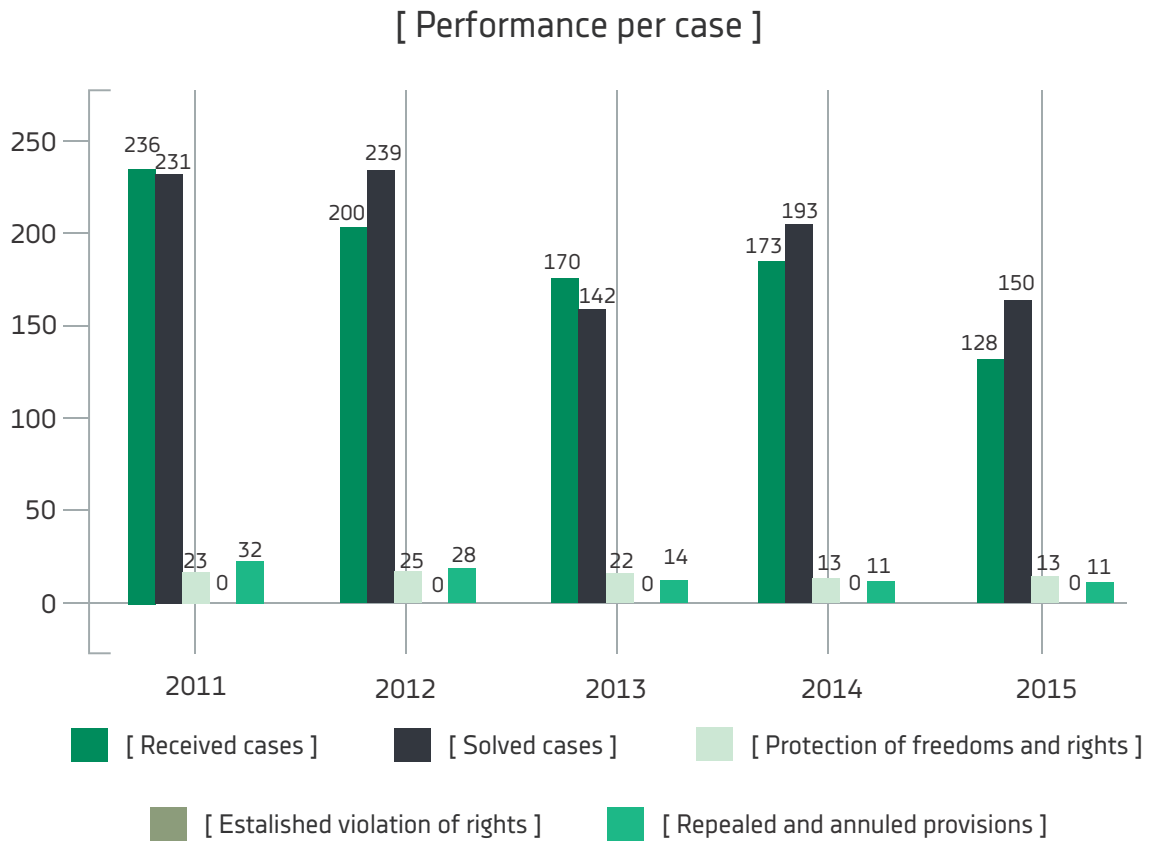
X. FINDINGS OF THE MONITORING TEAM

In the course of March 2015, immediately before the initiating of the monitoring of the sessions of the Constitutional Court, the Helsinki Committee sent a written notice to the President of the Constitutional Court **Elena Gosheva** informing her about the start of the project, its goal, and the planned activities. The President was informed that the monitoring of the work of the Constitutional Court shall take place in accordance with Chapter XI (Transparency/Publicity in the Work of the Constitutional Court) from the Rules of Procedure of the Constitutional Court, and that between one and three monitors shall be present during the sessions. The President was kindly asked to acquaint her colleagues - constitutional judges, as well as the Court's professional service, with the notice. It was highlighted that the project is of mutual interest and that we would appreciate it if she could appoint a contact person between the Court and the Helsinki Committee.

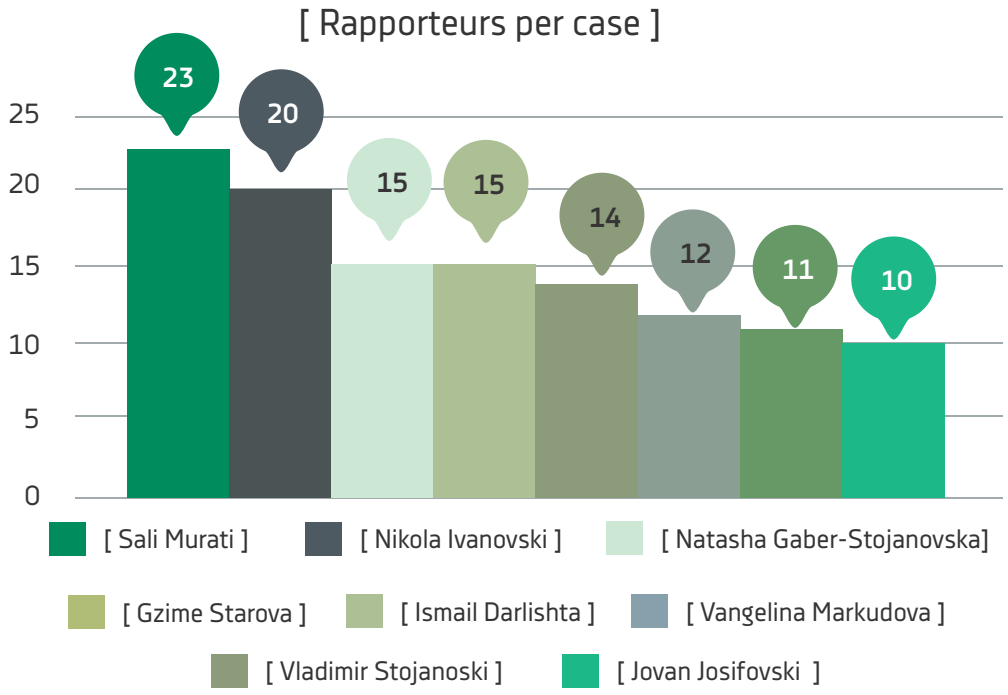
The project team was hoping that this approach would lead to establishing a relationship of confidence between the Helsinki Committee and the Constitutional Court. However, in the course of April 2015, **President Gosheva** sent a notice to the Committee stating that "Bearing in mind the status and integrity of the institution, the judges and the professional service, it would be impermissible for them to become subject of observation in the form of supervision and assessment by various subjects under their own project assignments with the purpose of making subjective conclusions". After this response, through a new letter, the President of the Helsinki Committee asked for a working meeting with the President of the Court in person, in order to acquaint her with the project goals and activities. The correspondence stated that the project does not aim to monitor the constitutional judges, but to determine the Court's strengths and weaknesses, in order to strengthen its impartiality and independence. There was no answer to this letter.

1. Quantitative indicators

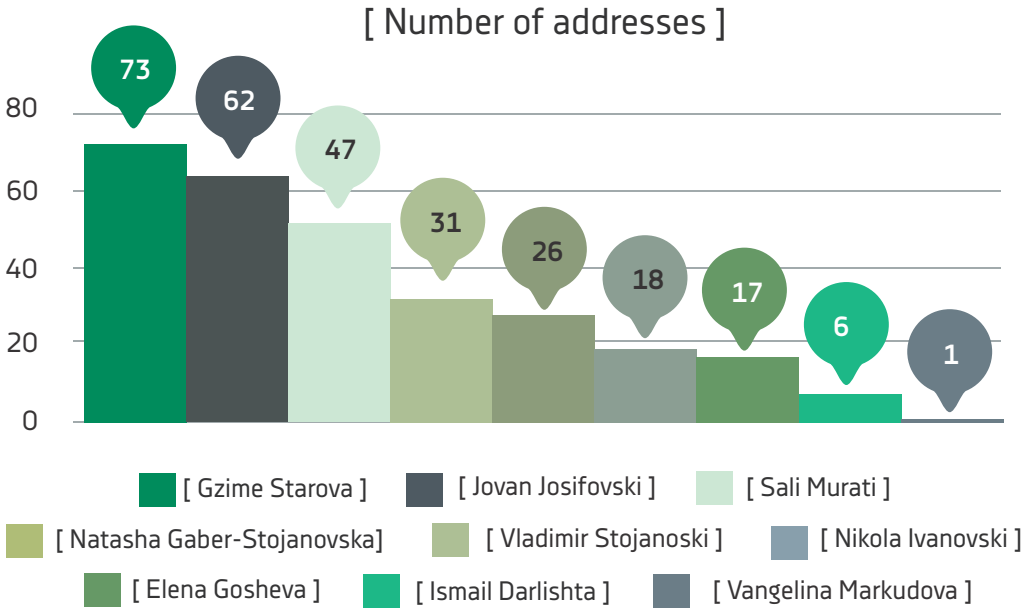
In order to obtain a historic overview of the work of the Constitutional Court, the monitoring team prepared a breakdown of the most important quantitative indicators for the work of the Court. The graph below presents the quantitative e activity of the Constitutional Court according to its performance per case.



As it can be observed, in the past five years, and especially since 2013 to date, the Constitutional Court of the Republic of Macedonia has undergone a decline in the number of received and closed cases, and a decline in the number of repealed and annulled provisions from laws and bylaws. According to annual reports of the Court, the number of cases received is on the constant decrease and compared to 2011 when 236 cases were received, 128 cases were received in 2015 (-46%). The comparison between those same two years in terms of closed cases is 231/150 (-35%); repealing/annulling decisions 32/11 (-66%). These negative indicators suggest unusual inertia in the work of the Court, a decline in the popular trust and bias towards the policies of the legislative and executive power.



As it can be noticed, there is a great discrepancy between the judges' activity in terms of their diligence on acting on the cases assigned to them. Although the alphabetical order of the judges' names is applied when assigning cases, it is noticeable that the two most diligent judges are twice as diligent as the two least active judges.



There is an even greater discrepancy in the number of times the judges have had addresses during case discussions. The judges do generally attend most of the scheduled sessions. In the course of the monitoring of the 30 session, none of the judges was absent during more than 10 percent (3) of the sessions. In spite of this, it is a striking fact that some judges took the floor over 60 times (**Gzime Starova** and **Jovan Josifovski**), while the majority of judges (5) took the floor less than 30 times. Judge **Ismail Darlishta** (had a total of 6 addresses) and judge **Vangelina Markudova**, who only had one address, demonstrated unusual passivity. However, it should be taken into consideration that the number of times the judges took the floor is largely a quantitative and not a qualitative indicator. This particularly applies to judge **Jovan Josifovski** who despite taking the floor 62 times and being second on the list of speakers, mainly had short addresses and very often he only pointed to the technical and linguistic corrections in the text of the reports of the judged-rapporteurs.

The sessions of the Constitutional Court were usually scheduled on Wednesdays, at 9:00 am. In general, the judges arrive on time and, in practice, the start of the sessions takes place between 9:00 and 9:15 am. However, the duration of the sessions is unusually short. Although the agenda sometimes has as much as 10 items for discussion, the average duration of the sessions open to the public amounted to 1 hour. The longest, **4 Session** took place on **24 February 2016** (see below in the "Independence" section), and lasted 4 hours and 30 minutes. The shortest, **22 Session** took place on **30 September 2015** and only lasted 10 minutes. Although in the course of 2015 the Court was left with 106 unclosed cases transferred from 2014, only 31 sessions were held in 2015. The inactivity of the Constitutional Court in the course of the summer months is a matter of particular concern, since the **20 Session** was held on **10 July 2015**, whereby the judges and employees went on a collective annual holiday, while **21 Session** took place on **23 September 2015**, i.e. after as much as 75 days of vacation, i.e. not holding public sessions.

2. Qualitative indicators

From the observed public sessions of the Constitutional Court, it was concluded that there is lack of debate on the submitted initiatives, and even where there is some form of debate, it is sparse, without sufficient argumentation in favour of or against the submitted constitutional initiative. The monitoring team paid special attention to four main components of the work of the Constitutional Court referring to its independence, impartiality, competence and transparency of both the judges and the Court as an institution. In addition, there was special consideration of the cases in which the citizens turned to the Constitutional Court with requests for protection of their freedoms and rights.

2.1 Independence

On the 26 Session of the Constitutional Court, held on 4 November 2015, the constitutionality of the Law on the Council Determining the Facts and Initiating Procedure for Liability of Judges (Official Gazette of the Republic of Macedonia no. 20/2015) was assessed. After the judge-rapporteur **Vladimir Stojanoski** briefly presented his report and proposed dropping the initiative, judge **Natasha Gaber-Damjanovska** took the floor and reacted to the answers regarding the initiative that the Assembly and the Government of the Republic of Macedonia had provided at the request of the Constitutional Court. The Judge emphasized that the answer by the Assembly is in fact the same answer the Government sent, meaning that it was a "copy-paste" answer. According to judge **Natasha Gaber-Damjanovska**, this act served to show the attitude of the other authorities, the Assembly of the Republic of Macedonia in particular, towards the Constitutional Court. Judge **Gzime Starova** then took the floor and continued the discussion about the answer of the Government of the RM and the Assembly of RM and emphasized that the unprofessional attitude of these two institutions towards the Constitutional Court had been apparent for a several sessions back. She highlighted that the written answer of the Assembly bears no stamp at all and expressed doubts that the Constitutional Court will react at all due to this kind of treatment. She also added that she is in a dilemma regarding the deployment of cases, since according to the Court's practice the deployment should take place by alphabetical order. This, in fact, indirectly meant that there were suspicions that this case should have been assigned to another judge, and not judge **Vladimir Stojanoski**. The discussion raises suspicions that the executive power interferes in areas which are under the competence of other authorities and in the independence of the Constitutional Court.

From the aspect of the Constitutional Court, it is worrying that there is absence of reaction on the part of the Constitution Court, which, as an independent institution, is tasked with protecting the constitutionality and legality, with regards to these actions of the legislative and executive powers. Although a minority of the judges routinely react against this practice and propose an official reaction, it seems that the majority of judges do not find this kind of attitude of the authorities towards the Constitutional Court troubling at all.

At the **3 Session** of the Constitutional Court held on **18 February 2016**, the constitutionality of the Decision for Dissolution of the Assembly of the Republic of Macedonia (Official Gazette of the RM no. 9/2016) was assessed. The initiative was submitted by an MP from the opposition and referred to the constitutionality of the postponed dissolution of the Assembly prior to the early elections. The judge-rapporteur **Natasha Gaber-Damjanovska** presented her report in detail, and, among other things, stated that the Constitution does not stipulate deferred effect of the decisions as it was in the case at hand. The judge stressed that the Constitution does not stipulate that the **MPs** can continue working after the Assembly is dissolved and said that she beloved the contested decision had an **erga omnes** effect (towards all), and since the citizens transfer their sovereignty to the Assembly, the decision is eligible for review by the Constitutional Court, as there is no other mechanism exerting judicial and legal control over the work of the Assembly. The majority of constitutional judges disagreed with this stance, which led to adoption of a decision to reject the initiative. The chief argument for rejection was that the Decision of the Assembly did not constitute a general administrative act, as claimed by judge-rapporteur **Natasha Gaber-Damjanovska** and that the constitutional Court does not have the competence to act on it. At the **14 Session** of the Constitutional Court held on **25 May 2016**, the Constitutional Court once again assessed the constitutionality of the same Decision for Dissolution of the Assembly. This time the initiative was submitted by an MP from the ruling party. In accordance with the practice of the Constitutional Court from the previous **3 Session** held less than three months apart from the **14 Session**, this initiative should have been rejected, taking into account that the Constitutional Court had already ruled on the matter. However, instead of this, the Constitutional Court adopted a unanimous decision to annul the Decision of the Assembly. These two sessions are a typical example of the reliance of the Constitutional Court, i.e. the majority of judges, on the legislative power, i.e. the ruling political parties.

At the **4 Session** of the Constitutional Court held on **24 February 2016**, the Court adopted a decision to initiate proceedings for assessment of the constitutionality of the Law Amending the Law on Pardons (Official Gazette of the RM no. 12/2009). The **7th Session** of the Constitutional Court held on **16 March 2016** involved repealing provisions of this law and all of its provisions, including the provision which stipulates that persons convicted of crimes against the election may not be pardoned. Before the adoption of the decision, the Helsinki Committee urged the Constitutional Court to rise above the partisan and personal interests and adopt a decision which will not find the law unconstitutional and will not repeal it. The appeal was in the direction of providing a space to build legal certainty and rule of law, as fundamental values of the constitutional order of the Republic of Macedonia. It is symptomatic that the Constitutional Court ruled that there are grounds to assess the constitutionality of this law, especially when it is taken into consideration that the initiative for contestation was submitted at the start of the February 2016, immediately after the opening of the case "Titanic" by the Special Public Prosecution, which involved former ministers Mile Janakieski and Gordana Jankulovska, as well as other persons close to the ruling coalition, in the role of suspects. The haste that the Constitutional Court undertook this case with (40 days from the submission of the initiative until the final decision) is a unique example of rapid action compared to any other initiative, which in a very transparent way unveiled the court's role as an instrument in defense of the partisan interests of a political party from the ruling coalition.

At the **8 Session** of the Constitutional Court held on **23 March 2016**, the constitutionality of a provision from the Law on Political Parties was assessed (Official Gazette of the Republic of Macedonia no. 76/2004, 5/2007, 8/2007, 5/2008 and 23/2013). The contested provision referred to the financial burden of the citizens wishing to found a party, i.e. the necessity to submit an original certificate of citizenship which costs 150 MKD. According to the applicants and the judge-rapporteur **Sali Murati**, this cost is unjustified and unconstitutional due to the fact that a personal identity card or passport is sufficient proof of citizenship. During the discussion on the initiative, judge **Jovan Josifovski** took the floor, emphasizing that "if those people aspiring to establish a political party which would fight for power in the elections have trouble spending 150 MKD to take out a certificate of citizenship, then they are not serious candidates for the political arena". Furthermore, he added that when he needed to submit the documentation necessary for his bid for President

of the State Electoral Committee he had to take out a certificate of citizenship on a Saturday, although this meant that the Deputy Minister of the Ministry of Interior had to be unexpectedly called to come to work, and he was also bound to pay a fee. This statement by judge **Jovan Josifovski** casts a shadow on this integrity as a judge. In fact, judges should be an example of equality in society and politically unaffiliated and neutral. Obtaining the certificate of citizenship on a Saturday, when this is not possible for other citizens in the presence of the deputy minister as a political officer raises serious doubts about the impartiality and independence of judge Josifovski and his decision-making capacity within the Constitutional Court.

2.2 Expertise

From a procedural aspect, the sessions are generally conducted in accordance with the Rules of Procedure of the Constitutional Court. Generally, President **Elena Gosheva** conducts the sessions appropriately, giving the floor to all present judges taking part in the discussion. The most serious objection is related to the manner in which judge-rapporteurs present their report. In fact, although the report is previously submitted to all judges, it is necessary for the judge-rapporteurs to present it in more detail, especially when representatives of the public are present in the courtroom. Without knowing the applicant or the request for protection of freedoms and rights of the citizens and a summary of the findings, the public would not be able to understand what exactly is being discussed during the hearing and the decision-making logic of the judges.

At the **10 Session** of the Constitutional Court held on **1 April 2015** the constitutionality of a provision from the Law on Labour Relations (Official Gazette of the RM no. 113/2014) was assessed. According to the changes to the law, it was stipulated for men to be able to extend their employment up until the age of 67, while the limitation for women was 65 years of age, which raised the constitutional and legal issue of possible discrimination of citizens on grounds of sex. During the session, a decision was made to initiate proceedings on this law, and a decision to stop the enforcement of the individual acts or actions taken on grounds of the contested provisions to be in place until a final decision was adopted. The Constitutional Court took as many as 14 whole months to reach the final decision which was adopted during the **18 Session** on **29 June 2016**. The decision repealed the contested provision which was assessed as discriminatory. Apart from the unusual delay in the adoption of the final decision, the fact that it was repealed (it applies after the adoption of the decision) rather than annulled (it assumes that the contested provision could not have produced legal consequences) is also disputable. An annulling decision would have been to the benefit of the women who retired during the 14-month- long legal vacuum by force of law, and were unable to extend their employment during that period.

At the **14 Session** of the Constitutional Court held on **27 May 2015**, the constitutionality of the Rulebook on the Form and Content of the Travel Order (Official Gazette of RM no. 46/2007) was assessed. Judge **Gzime Starova** who was judge-rapporteur emphasized that the contested Rulebook was adopted by the Minister of Transport and Communications, but a new Rulebook was subsequently adopted in 2015, and due to the change in the circumstances she proposed the initiative to be rejected. Judge **Sali Murati** took the floor stating that the judges should check whether the changes in such cases are substantive, or only symbolic. According to him, if there are only technical changes, the Constitutional Court should proceed to review the provisions of the new Rulebook at its own initiative. This standpoint of judge Murati is commendable, i.e. it is necessary, even in case when a certain contested act has been repealed, or has stopped applying, the Constitutional Court to check ex officio, whether the contested provisions have been transferred to a more recent legal act which has legal effect.

At the same session there was also a discussion on whether, when it comes to legal acts which are no longer in legal operation, (such as the previously mentioned contested Rulebook), it is necessary to ask for the standpoint of the bearer of the act, in this specific case the Minister of Transport and Communication. According to judge Jovan Josifovski, who took the floor, this would be necessary. The Helsinki Committee agrees with the majority of judges that if a certain act is out of legal operation because it has been repealed, it is not possible to ask for the standpoint or opinion of its bearer. Therefore, judge **Jovan Josifovski's** insistence to ask for the

bearer's standpoint comes as somewhat surprising. However, it must be taken into consideration that the contested provisions from the old act may also occur in the new act. In such a case, the monitoring team believes that it is necessary to ask for the standpoint, i.e. explanation of the bearer of the act with regards to the allegedly unconstitutional provisions from the act.

At the **16 Session** of the Constitutional Court of the RM, held on **18 June 2015**, the constitutionality of certain provisions of the Law on Administrative Servants (Official Gazette of the RM no. 27/2014) was assessed. In certain articles of the law, international terms and abbreviations were used referring to names of organizations and international certificates, which had not been properly translated in accordance with the use of the Macedonian language and were left in the Latin alphabet. According to judge-rapporteur, **Nikola Ivanovski**, the translation of names of internationally recognized certificates is an exception and is in accordance with the Law on the Use of Foreign Languages, and therefore the use of the Latin alphabet may not be brought under constitutional review as it is in accordance with the constitutional provisions for use of the Macedonian language and its Cyrillic alphabet.

Judge **Gzime Starova** expressed doubt as to whether Macedonian is truly consistently used and believed that this way of quoting and transliterating the words signifies inconsistency in the use of the Cyrillic alphabet, because some of the words were only left in the Latin alphabet, others were also written in Latin, but with a Cyrillic equivalent in brackets, and there were also some which were simply transliterated and not adjusted to the Macedonian context which brings into question the possibility of their practical implementation. Judge **Jovan Josifovski** disagreed with this stance and emphasized that the Latin alphabet has been used in other laws as well, and consequently, the provisions of the contested law are not unconstitutional. According to Article 7 from the Constitution of RM, "the official language over the entire territory of the Republic of Macedonia and in its international relations is the Macedonian language and its Cyrillic alphabet".

Given this explanation, we believe that the stance of judge **Gzime Starova** regarding the contested articles of the Law on Administrative Servants is grounded. The stance of judge **Jovan Josifovski** is ungrounded bearing in mind that the Constitutional Court assesses whether laws are in accordance with the Constitution of the RM and not other laws (in this specific case, the laws on administrative servants and use of foreign languages or other laws). The unified and consistent use of terminology in legislation is of crucial importance, since the correct translation of the terms directly affects the efficiency in their use. We believe that using solely the Latin alphabet is a violation of the provisions of the Constitution with regards to the proper use of the Macedonian language and its Cyrillic alphabet.

At the **4 Session** of the Constitutional Court held on **24 February 2016**, the Court assessed the constitutionality of the Law Amending the Law on Pardons (Official Gazette of RM no. 12/2009). First judge-rapporteur **Nikola Ivanovski** elaborated on his report, stressing that the law is completely unconstitutional, since it limits the rights of the President of the RM. After his presentation, judges **Natasha Gaber-Damjanovska, Gzime Starova** and **Sali Murati** reacted to the elaboration and arguments set forth by judge-rapporteur **Nikola Ivanovski**, stressing that judge **Ivanovski** was the one who defended the constitutionality of the publicly-available Register of Pedophiles, yet now believes that the President of the RM should be able to pardon them. To this, judge-rapporteur responded that if it were up to him, he would have stipulated the death sentence of certain crimes. Such a stance of judge **Nikola Ivanovski** causes great concern, especially because the death penalty in the Republic of Macedonia is prohibited both by the Constitution, as well as by the international agreements ratified by the state, including the European Convention on Protection of Human Rights.

At the next, **5 Session** of the Constitutional Court held on **2 March 2016**, before the start of the session the judges had an extended discussion on the agenda of the previous **4 Session**. President **Elena Gosheva** reacted to this, emphasizing that this issue is not to be discussed at a session, but during a staff-meeting. The monitoring team agrees with the argumentation of the President, and such a discussion is indicative of the lack of internal communication between some of the judges of the Constitutional Court.

At the **9 Session** of the Constitutional Court held on **30 March 2016**, the constitutionality of a provision of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia (Official Gazette of the Republic of Macedonia no. 70/1992) was assessed, contested by a legal person. Judge-rapporteur **Jovan Josifovski** proposed to reject the initiative because the Constitutional Court is unable to assess the constitutionality of an act that it has adopted itself (see below in "Impartiality"). After the presentation of the judge-rapporteur, judge **Sali Murati** took the floor and raised the issue of whether a legal entity may occur as an initiator. The monitoring team points out that Article 110, paragraph 1, line 3 of the Constitution of the Republic of Macedonia stipulates that the Constitutional Court protects the freedoms and rights of the "human and citizen". Article 51 of the Rules of Procedure of the Constitutional Court states that "any citizen" who believes that his/her right or freedom stipulated with Article 110, line 3 from the Constitution of RM has been violated with an individual act or action, may seek protection from the Constitutional Court. Finally, in case E.no.61/2012, in which a legal entity acted as applicant, the Constitutional Court stated that the requests for protection of freedoms and rights submitted by legal entities are inadmissible. However, this specific case did not involve a request for protection of human rights and freedoms, but an initiative serving to contest the constitutionality of a bylaw. Consequently, the obstacles posed to legal entities when it comes to requests for protection of human rights and freedoms are not in place when it comes to submission of initiatives. This legal situation is stipulated in Article 12 of the Rules of Procedure of the Constitutional Court, which states that "anyone" may submit an initiative for proceedings assessing the constitutionality of law and the constitutionality and legality of a regulation, or another general act.

At the **10 Session** of the Constitutional Court held on **13 April 2016**, the constitutionality of certain provisions from the Law on Safety of Road Traffic (Official Gazette of the Republic of Macedonia no. 169/2015) was assessed. The essence of the initiative revolved around the obligation for the driving schools to provide video and audio records of the training premises and the training vehicles, with the possibility of archiving of the recorded data. According to the applicants - the driving schools, this, among other things, was contrary to the candidates' right to privacy. After a lengthy debate, the majority of judges found that these provisions are of public interest, while a minority believed that they involved a violation of the privacy of citizens. The debate on privacy and protection of personal data as opposed to the public interest, i.e. the statement that the contested provisions contribute towards increased protection of people and general good in traffic led to diametrically opposing views of the judges. The monitoring team believes that on such important issues it is necessary for the Constitutional Court to organize public hearings (Articles 33-50 from the Rules of Procedure of the Constitutional Court). It would have been useful if the participants in the proceedings (the driving schools which contested the provision) had been invited to such a hearing, as well as the bodies, organizations, scientists and professionals working in this area. Without a comparative analysis in the report, and without the involvement of more stakeholders, the constitutional judges risk adopting decisions which would be to the detriment of citizens and their constitutional rights.

2.3 Impartiality

At the **19 Session** of the Constitutional Court of RM held on **8 July 2015** the constitutionality of the Law on Filmmaking (Official Gazette of the Republic of Macedonia no. 82/2013, 18/2014 and 14/2014) was assessed. According to the judge-rapporteur **Vladimir Stojanoski**, this law would lead to a great breakthrough in filmmaking. Judge **Gzime Starova** took the floor to say that the purpose of the session was to decide on the constitutionality of the provisions or lack thereof, and not the expected results from the contested law. The monitoring team agrees with the viewpoint of judge **Gzime Starova** and believes that the role of the constitutional judges is not to provide their personal standpoints on the possible benefits of the law, but their compliance or lack of compliance with the Constitution of RM.

At the 31 Session of the Constitutional Court held on 23 December 2015, there was a discussion at a citizen's request for protection of freedoms and rights on case E.no. 84/2015. After judge **Jovan Josifovski** briefly presented his report, judge **Sali Murati** took the floor to emphasize that he disagrees with the report did not cite any case law. The judge-rapporteur **Jovan Josifovski** replied that he did not cite any

case law in his report because he believed that if the case law was not in favour of the report, there was no need for it to be included. Judge **Sali Murati** expressed his disagreement with judge **Jovan Josifovski's** standpoint that only the constitutional jurisprudence that is in favour of the report should be used in the drafting of the reports. The team of observers strongly agrees with the standpoint of judge **Sali Murati** and is appalled by the fact that a judge from the Constitutional Court is not aware of his bias and makes decisions with predetermined attitude, i.e. without referring to the Court's previous practice, regardless of whether it coincides with his own convictions which need to be free of any prejudice.

At the **1 Session** of the Constitutional Court held on **3 February 2016** the constitutionality and legality of the Collective Agreement of Makedonski telekom AD Skopje (JSC Macedonian Telecommunications Skopje) no. 02-76267/1 from 26 March 2014 was assessed. After the judge-rapporteur **Nikola Ivanovski** proposed the initiative to be declined as it was not under the competence of the Constitutional Court, judge **Gzime Starova** took the floor, pointing out that the report stated that there had been a response by Makedonski telekom. Makedonski telekom also submitted some of its internal regulations. The judge remarked that the other judges did not have access to these documents. According to her, it was necessary to see those regulations in order to be able to make a decision on how to vote. The monitoring team agrees with judge **Gzime Starova** that all the responses provided to the judge-rapporteur must be attached to his/her report so that all of the judges can gain insight into the submitted materials which may affect their vote. At the same session the legality of the General Collective Agreement for the Private Sector from the area of Commerce - consolidated text (Official Gazette of the Republic of Macedonia no. 115/2014) was also assessed. Judge-rapporteur **Nikola Ivanovski** pointed out that he asked for further clarification of the initiative submitted by Stamen Filipov (applicant of over 200 successful initiatives to the Constitutional Court), but instead of further clarification he was sent a brand new initiative. According to the judge, the applicant was "fooling with" the Constitutional Court although he was well acquainted with the procedure before the Court. The monitoring team believes that it is not very professional on the part of the judges to use vocabulary such as "fooling", because the procedure before the Constitutional Court most often takes place solely via written documents, so it is unclear how, under those circumstances, any applicant of an initiative could mock the Constitutional Court.

At the **8 Session** of the Constitutional Court held on **23 March 2015**, the constitutionality of a provision from the Law on Political Parties was assessed (Official Gazette of the Republic of Macedonia, no.76/2004, 5/2007, 8/2007, 5/2008 and 23/2013). After the judge-rapporteur **Sali Murati** presented his report in detail and a discussion followed, the judge-rapporteur suggested that the associate who had worked on the document could supplement the report. Immediately after this proposal, President **Elena Gosheva** took the floor and pointed out that there would be no need of a presentation by the associate who worked on the report, since the discussion was already fully exhausted. The state councilor in question is one of the most experienced employees in the Constitutional Court and he acted as the Court's spokesperson until 2014. This position was repealed by the new majority and the President of the Constitutional Court. Judge-rapporteur **Sali Murati** reacted to the statement of the President and stressed that the involvement of state councilors had been permitted in the past. His reaction was immediately followed by the reaction of judge **Gzime Starova** who highlighted that this action was unprecedented. Then the state councilor took the floor and asked the President why she would not give him the chance to join the discussion. President **Elena Gosheva** briefly reiterated that there is no need to include the state councilor and proceeded with the next item on the agenda.

At the **9 Session** of the Constitutional Court held on **30 March 2016**, the constitutionality of a provision from the Rules of Procedure of the Constitutional Court of the Republic of Macedonia (Official Gazette of the Republic of Macedonia no.70/1992) was assessed, contested by a legal entity. The judge-rapporteur **Jovan Josifovski** stated that there are procedural obstacles for the assessment of this initiative, because the Constitutional Court cannot be both a participant and assessor of the proceedings. For these reasons, he proposed rejecting the initiative as a whole. When it comes to whether the Constitutional Court can assess its own legal act (the Rules of Procedure) the monitoring team believes that this issue serves to once again highlight the need of adoption of a law that would govern the work of the Constitutional Court. Although the Rules of Procedure of the Constitutional Court were adopted in 1992 from members different than the ones today, it would be against the law if the present members repealed or annulled any of the provisions. However,

the inability to act on this initiative does not mean that the Constitutional Court would not be able to change provisions in its own Rules of Procedure, at its own conviction, in case it believes they are not in accordance with the Constitution.

2.4 Transparency

Until 11 June 2014, the Constitutional Court was one of the most transparent institutions in the country. This was largely due to the permission given to journalists and the media to do audio and visual recordings during the Court's public sessions. In addition, until 2014, the Constitutional Court had appointed a person from its Professional Service who was in charge of public relations. The Court's spokesperson often held briefings for the media and the interested parties regarding the work and decisions of the Constitutional Court. This positive practice was abandoned after the replacement of the majority of judges (5) and President Elena Gosheva with a short explanation that the camera people were obstructing the work of the judges. The media, the Helsinki Committee,[60] and the Association of Journalists of Macedonia asked for an explanation of the decision and the manner of its adoption. No response was provided. Shortly after the ban on recording, the Court also discontinued the position of a Court's spokesperson, and the public relations continued with a downward intensity, through the Secretary General of the Constitutional Court.

The citizens of the Republic of Macedonia have shown very little interest in attending sessions of the Court in the role of a public. The public is not informed at all about the ways in which it can exercise its right to be present in the courtroom during the sessions. The regular and timely updating of the Court's web-site is commendable, but no information is provided on how the citizens interested in attending a session can access the Court.

At the **15 Session** of the Constitutional Court held on **3 June 2015** the public was excluded at the start of the session when the judges were deciding on the procedural issue, i.e. when the agenda was put up for a vote. This is contrary to the Court's Rules of Procedure which stipulate exclusion of the public solely during the voting for adoption of decisions.

On the **21 Session** of the Constitutional Court held in **23 September 2015** the constitutionality of the provisions from the Laws Amending the Law on Contributions for Compulsory Social Insurance (Official Gazette of RM no. 113/2014 and 20/2015) were assessed. Judge-rapporteur **Nikola Ivanovski** briefly presented the report and asked for the initiative to be dropped, which provoked the reaction of judge **Natasha Gaber-Damjanovska** who pointed out that the initiative .was submitted by 6,000 people and consequently required due attention, as well as that the case required a more extensive analysis. The monitoring team agrees with the standpoint of judge **Natasha Gaber-Damjanovska** that initiatives submitted by thousands of citizens deserve a more detailed analysis and require more time when the arguments for the initiative are presented. The large number of applicants also signifies an issue of public interest, which, as such, deserves an adequate response from the state institutions that it has been addressed to. By rejecting such initiatives prematurely, the Constitutional Court does not contribute to the transparency and accountability in its work and thus risks losing the citizens' confidence.

On 15 March 2016, the web-site of the Constitutional Court was updated with the notification for the date of the **7 session** of the Court scheduled for **16 March 2016**. According to the notice, the Constitutional Court had allegedly decided to have the session closed to the public. According to Article 83 from the Rules of Procedure of the Constitutional Court, the work of the Court is public. Article 85 stipulates that the public may be excluded if the interests of the security and defense of the country require so, as well as in case of keeping a state, official or business secret, protection of the public morality and in other justified cases determined by the Court. The Helsinki Committee publicly urged the President of the Constitutional Court **Elena Gosheva** to provide an explanation as to why and in what manner the decision to exclude the public during the 7 Session of the Court was made. Taking into account that the Constitutional Court, i.e. the majority of constitutional judges, decide on the exclusion of the public, we publicly asked whether and when a working meeting of the constitutional judges was held to determine whether there are reasonable grounds to close the session and adopt this undemocratic decision, or was this done arbitrarily by the President of the Court, or some of the other judges

[60] http://www.mhc.org.mk/announcements/218

or employees of the Court? We believe that the Constitutional Court must not continue with the tendency of non-transparency of the institutions and allow a different definition of public monitoring and informing about its work. In June 2014 the President of the Constitutional Court adopted an oral decision which banned the media from recording, both audio and visual footage of the sessions of the Constitutional Court.

With the decision from **15 May 2016**, the Constitutional Court became fully closed to the public, which is contrary to the principles of transparency and accountability, democracy and the rule of law.

At the **12 Session** of the Constitutional Court held on 11 May 2016, the constitutionality of a provision from the Law on Higher Education (Official Gazette of the Republic of Macedonia no. 145/2015 and 154/2015) was assessed. Judge-rapporteur **Jovan Josifovski** elaborated that the contested provision refers to the State Exam (external texting) which will start to be implemented from the school year of 2017-2018. According to the judge-rapporteur, the initiator insufficiently addressed the contested provision, and provided more material on other topics and attached photos of provosts, wrote about assemblies, submitted historical materials, etc. According to this, judge **Jovan Josifovski** proposed the initiative to be rejected. Judge **Gzime Starova** took the floor and emphasized that who the initiative was submitted by is of the least importance. The initiator has the liberty to provide arguments as he/she thinks fit. Furthermore, she emphasized that the provision shall be an additional financial burden to students and that there is a possibility the Constitutional Court to rule on this at its own initiative. According to the judge, it is necessary for the judges to thoroughly review this initiative, on a topic that has stirred society. The monitoring team believes that the Constitutional Court should have organized a public hearing (Articles 33-50 of the Rules of Procedure of the Constitutional Court) on this provision, which was the reason for mass students rallies in 2015. It would have been useful to invite the parties in the proceedings during such a hearing (the students who were contesting the provisions), as well as the bodies, organizations, scientists and professionals working in this area. In that way the public, and especially the thousands of involved students, would have gained insight into the constitutionality, or lack thereof, of the State Exam (the external testing of students).

2.5 Protection of the freedoms and rights of citizens

In the course of 2015, the Constitutional Court received only 13 requests for protection of freedoms and rights submitted by the citizens, and acted on 11 of them. This downward trend extended into the period January - June 2016, when the Constitutional Court acted on only 4 requests of this kind. In comparison, in the course of 2012, before the majority of the constitutional judges were changed, the Constitutional Court acted on 25 requests for protection of citizens' freedoms and rights. This indicates a dramatic decline in the citizens' trust in the Constitutional Court. In fact, during its 24 years of existence, the Constitutional Court has received a total of 300 requests for protection of freedoms and rights by citizens, and has adopted only one decision (E.no. 84/09 from 10 February 2010) in which a violation of the citizen's right to political activity was established. According to this, this legal instrument in the Macedonian justice system cannot be considered an effective legal remedy within the meaning of Article 13 from the European Convention for the Protection of Human Rights and Liberties. Although according to Article 55 of the Rules of Procedure of the Constitutional Court, the Constitutional Court decides on the protection of freedoms and rights, as a rule, based on a public hearing, there was only one public hearing in 2015, and none in the first half of 2016.

From the monitored sessions of the Constitutional Court it becomes clear that the requests for protection of freedoms and rights by the citizens are virtually not discussed. In such cases, most often the judge-rapporteur says that there is nothing to add to his/her report (which is not publicly available) whereby he/she proposes the request to be declined. At the **24 Session** of the Constitutional Court held on **14 October 2015**, the request for protection of the freedom of public expression of opinion, submitted by two journalists, was discussed after the regular courts found that they had insulted and defamed a public official. After judge-rapporteur **Jovan Josifovski** briefly presented his report, he stressed that the statements in the submitted initiative were ungrounded and proposed rejecting the request. He stressed that the courts of the first and second instance had properly established the facts and adequately applied the substantial law. Judge **Natasha Gaber-Damjanovska** reacted to this, emphasizing that a bearer of public office should be more resilient to public comments and criticism. Judge **Gzime Starova** also took the floor, pointing out that she has objections with regards to the sentencing, that the Constitutional Court does not have competence

over the sentencing, but that she believes that the amount of the sanction should be taken into account when deciding on the request. The majority of judges decided to decline the request.

A typical example of the failure of the Constitutional Court to protect the citizens' requests for protection of freedoms and rights is the request for protection of freedoms and rights E.no. 165/2014, reviewed during the **9 Session** of the Constitutional Court held on **25 March 2015.** The request referred to protection of the freedoms and rights in a case of discrimination on grounds of political affiliation.

A group of employees in PE "Komunalec" - Gostivar were in question, who are members of a political party (NB. National Democratic Revival). After the local elections in 2013, some of the applicants were laid off and some were reassigned to lower positions that do not correspond to their qualifications. In the presentation of the report, Judge-Rapporteur **Vangelina Markudova** noted that employees filed lawsuits for discrimination on grounds of political affiliation to the Court in Gostivar which reached an effective verdict that there had been no discrimination. The judge also stressed that the applicants had not previously submitted a complaint to the Commission for Protection against Discrimination. Finally, she ended her presentation arguing that the Constitutional Court has no authority to rule on the constitutionality of this issue. A discussion ensued after the presentation of the report. Judge **Natasha Gaber-Damjanovska** had objections because the report stated that the applicants did not turn to the Commission for Protection against Discrimination, although this does not preclude the actions of the Constitutional Court. In addition, the judge pointed out that even if the applicants had turned to the Commission, it would not have been able to act considering the fact that the applicants had already started litigation. Judge **Jovan Josifovski** agreed with these arguments. Judge **Sali Murati** said that there is an increasing number of people who turn to the Constitutional Court for protection against discrimination on grounds of political affiliation. He said that the burden of proof in the proceedings for discrimination, according to the Law on Prevention and Protection against Discrimination, is borne by the party that is being sued. Judge **Gzime Starova** pointed out that it would be easiest for the Court to conclude that it has no authority, but that there is an obvious tendency in the country of politicization when accessing the workplace.

According to her, the Constitutional Court has an obligation to act with special attention, because the decisions of the Court can contribute towards depoliticization. The judge concluded that all forms of discrimination are difficult to prove. In his address, judge **Sali Murati** once again stated that acting on such requests submitted by citizens to the Constitutional Court strengthens the legal system of the Republic of Macedonia and therefore proposed a public hearing on the case. President **Elena Gosheva** put the proposal to schedule a public hearing on the case up for voting whereby six judges voted IN FAVOUR, while three judges were AGAINST.

The public hearing was scheduled and held on **November 26, 2015**, i.e. **8 months** after the decision to schedule one was adopted. Journalists, the submitters of the request for protection of rights and freedoms, their legal representative, representative of the Ombudsman, as well as TV crews of 4 national television stations attended the debate in the capacity of the public. Judge-rapporteur **Vangelina Markudova** noted that the public hearing was organized after the request submitted by several employees in PE "Komunalec" - Gostivar for protection of their rights and freedoms. She explained that the applicants are members of a political party - the National Democratic Revival (NDP). The Managing Director of the public enterprise is a member of the political party Democratic Union for Integration (DUI). His decisions for dismissal and reassignment of the applicants were challenged and overturned by the regular courts, but some of the judgments were still not effective at the time of the public hearing.

The applicants spoke about the attitude of the new management of the Public Enterprise towards them. It was a very difficult period for them in which they were subjected to continual discrimination. The applicants were shouted at in the corridors of the company and faced questions and insults like "Are you (Rufi's people) still here? What are you waiting for, go home!" The employees were pressured to change the party affiliation. According to representatives of the public enterprise, all the disputed decisions for reassignment at work were adopted pursuant to the Act on Systematization of the company. After the statements of the applicants, the Managing Director of PE "Komunalec" - Gostivar took the stand and expressed preference to talk in his native Albanian. The President of the Constitutional Court **Elena Gosheva** replied that the Constitutional Court does

not have a permanent interpreter and that if he wanted to speak in his mother tongue he should have informed the court before the start of the public hearing. The Director stressed that in this way his right to talk in his native language was violated. Judges **Nikola Ivanovski** and **Sali Murati** proposed the public hearing to be postponed. As no one was against President Elena Gosheva adjourned the hearing and noted that the Constitutional Court will schedule an additional date for the next part.

Instead of scheduling the second part of the public hearing, the Constitutional Court, at the **15 Session** held on **31 May 2016**, i.e. 14 months after the 9 Session of the Constitutional Court held on **25 March 2015** and 6 months after the interrupted public hearing, adopted decision E.no. 165/2014 rejecting the applicants' request for establishing discrimination.

These long-term actions of the Constitutional Court are concerning. Despite the procedural obligations to continue the public hearing, the Constitutional Court, in an unprofessional and clandestine manner, adopted a decision without hearing all the parties and participants in the proceedings. Such actions are contrary to Article 55 of the Rules of Procedure of the Constitutional Court which stipulate that the Ombudsman shall be invited at the hearing and shall have a mandatory address, unless he/she fails to attend, despite being duly summoned. It is also worrying that the Constitutional Court does not use the services of an interpreter from and into Albanian. Although such public hearings are very rare in practice, the Constitutional Court, in the spirit of the Ohrid Framework Agreement reflected in the Constitution through the amendments from 2001, should take into account that when the parties participating in the proceedings are members of some of the communities in the Republic of Macedonia, it is necessary to enable them to use their language in the Court. The overall conduct points to the fact that the introduction of the instrument of "constitutional appeal" is necessary in Macedonia, but without simultaneously strengthening the capacity of the judges and the capacity of the Constitutional Court itself which does not seem to be fulfilling one of the most important roles that it was established for - protection freedoms and rights of citizens, this would be futile.

XI. CONSTITUTIONAL APPEAL

The provision and protection of human rights and freedoms is one of the basic prerequisites for a democracy functioning through the principles of rule of law. Historically observed, from the moment of adoption of the Universal Declaration of Human Rights by the Organization of the United Nations (UN), there have been numerous activities in this area. Apart from the adoption and ratification of the European Convention on the Basic Human Rights and Freedoms (hereinafter ECHR), and its accompanying protocols, there are also many other international documents in this area which treat human rights and freedoms. There have also been numerous efforts to grasp the significance of providing the exercise of human rights and freedoms.

1. European standards

The preamble of the European Convention on Protection of Human Rights and Liberties points to the goal that the Universal Declaration is aiming at, which is to provide general and effective recognition and fulfillment of the rights stipulated with it. The Council of Europe, on the other hand, as an international organization, has the goal of achieving increased unity among its members and in order to achieve this goal it is necessary to protect and develop human rights and fundamental freedoms. This document reaffirms the profound commitment of the Council of Europe to those basic human freedoms incorporated in the pillars of justice and world peace and whose protection is based on real political democracy and the common understanding and respect for the human rights that these freedoms depend on. At the same time, the joint aspirations of the European countries and their heritage of ideals and political tradition, respect for freedom and rule of law to take the first steps towards collectively guaranteeing certain rights laid down in the Universal Declaration were highlighted. [61]

By following the content of ECHR, it is particularly important to implement the obligation accepted by every country to enable and protect human rights and freedoms, not only with its theoretical approach, which assumes the existence of legislation, but also to uphold them in practice by producing legal effect from the existing legislation. The European Court of Human Rights (hereinafter: ECHR) stressed that the enabling should be exercised by means of remedy provided by the state that is effective in practice as well as in law.[62] According to the court's jurisprudence in order for those remedies to be relevant they need to be "realistic and effective, and not theoretical and illusionary". Numerous criteria have been established by ECHR about the effectiveness of those remedies, the crucial ones among them being to enable and provide adequate indemnity, compensation for the damages suffered, but at the same time provide a resolution to the substance of the right at stake. The exercising of the existing principle of Subsidiarity and the obligation for its application is also in this context. The principle of Subsidiarity is presented and applied through the ECHR as one of the principles for its interpretation. Protocol 15 of the ECHR which more explicitly presents the obligation of the member-country to exercise protection of human rights and freedoms through the national legislation in the national bodies, serves to further strengthen this principle. Certain countries from the region and beyond have fulfilled this obligation previously, before the adoption of this Protocol and its ratification, by providing the possibility, among the other remedies envisaged in the national law, to initiate proceedings to exercise protection of human rights and freedoms before the Constitutional Courts as the highest body in those countries competent for protection of the Constitution of the country in question. This approach is completely acceptable given that these are fundamental rights and freedoms which are, in fact, a constitutional and legal category. Some countries have implemented this possibility later, while some are still in the phase of studying which approach to take on this issue.

[61] Preamble to the European Convention on Protection of Human Rights and Fundamental Freedoms
[62] Види пресуда Ротару против Романија, Жалба бр. 28341/95.

2. Constitutional Appeal in the Western Balkans

By analyzing the situation in the region of former Yugoslavia, it is fairly easy to come up with a conclusion that this remedy provided within the justice system has been given various names in the various countries, as follows: appellation - in Bosnia and Herzegovina, constitutional appeal - in the Republic of Croatia, constitutional complaint - in the Republic Serbia and in Montenegro. Please find copies of the templates for practical implementation of the remedies attached to this text. How the remedy is named is irrelevant if it is taken into account what the goal of its introduction is. As it has already been stated, the primary goal for introduction of these remedies is to have the highest body in the state, which is in fact a body separate and independent from the regular judiciary, separate from the legislative and executive power, treat the issues of protection of human rights and freedoms as a final instance in the country. At the same time, it also constitutes the last resort within the state for exercising protection of human rights and freedoms prior to exercising the possibility to apply to the European Court of Human Rights and Freedoms - ECtHR. The Republic of Macedonia, although it has ratified the European Convention and Protocol no. 15, has only restrictively provided the subsidiary principle, by means of applying the remedy before the Constitutional Court for protection of certain rights and freedoms.

It is necessary to stress that the Constitutional Courts as national bodies are also competent for protection of the Constitution of a given country. The implementation of these remedies is closely tied to the previous utilization of legal remedies as a legally provided opportunity for legal protection. The character of the decision of the Constitutional Court in question is also shaped depending on the character of the individual legal act being contested before the Constitutional Court and the content of the request itself. It is certain that in this segment, the reasons and the motivation provided for the submitted request are also of significance. In order to simplify the obligations of the interested party, the simplest approach to the Constitutional Courts is by filling out the existing specific form which constitutes the initial act for a proceeding before the Constitutional Court. The countries in the region follow the example of the ECtHR which has published its form on the Court's web-site. Taking into account the content of these forms, the interested parties provide relevant data which needs to be presented in a clear and coherent manner in order to make it possible for the Constitutional Courts to act on the requests efficiently and effectively.

In the course of its work on the legal remedy submitted to the Constitutional Courts in these States, the Courts primarily determine and establish the intervention in the substantial law or freedom and then proceed to determine the acceptability of the request based on the content of the request itself and adopt a decision primarily bearing in mind the request posed by the interested party. Among other things, the decisions of the Constitutional Courts move in the direction of annulling and repealing the individual act, returning the case back to the body which committed the possible violation, posing a ban to further continue with certain activities, imposing removal of the harmful consequences within a given deadline, ordering certain actions to be undertaken, reinstatement, compensation for pecuniary and non-pecuniary damage, as well as announcement of its decision.

The efficiency and effectiveness in the actions of the Constitutional Courts may be best assessed by controlling the enforcement of the decisions of the Constitutional Courts. The enforcement of the decisions is a complicated issue and the answer may be found in each separate case. It is worth mentioning that there is a large number of problems in the enforcement of the decisions of the Constitutional Court which brings into question the efficient provision and protection of a specific right or freedom. Undoubtedly, these problems continue to be in the focus of the attention of the ECtHR, not only from the aspect of the efficiency of the remedy as such, but also the very exercise of human rights and freedoms from a procedural and substantive point of view.

3. The need of a Constitutional Appeal in the Republic of Macedonia

The situation in the Republic of Macedonia with regards to the issue of the existence of the possibility to apply a remedy before the Constitutional Court related to the issue of exercising the protection of human rights and freedoms is different compared to all the other countries from the region and beyond. Unfortunately, the situation surrounding these issues may not be assessed as positive although there is a theoretical possibility the Constitutional Court of the Republic of Macedonia to act in the field of protection of certain rights and freedoms in a certain area. However, in practice the results achieved in this limited area are not at an envious level at all. According to the Constitution of the Republic of Macedonia, the Constitutional Court of RM is the body protecting the constitutionality and legality. This general description of the authority of the Constitutional Court is further explained and upgraded with the other articles from the Constitution which address the issue of competence of the Constitution Court. Thus, in accordance with Article 110 from the Constitution of RM, the Constitutional Court of RM protects the freedoms and rights of humans and citizens related to the freedom of conviction, conscience, thought and public expression of thought, political association and action and prohibits discrimination on the grounds of sex, race, religion or national, social or political affiliation. This positioning of the Constitutional Court leads to the conclusion that in the area of human rights and freedoms, only certain rights would be eligible for protection by the Constitutional Court by submitting a request. There is no response to this approach. It may only be speculated why the legislator opted for this kind of approach, yet however, it has to be concluded that this approach is exceptionally restrictive. The circumstance that there is a possibility to enable certain court protection in the proceedings before the regular courts is not disputable, but the idea to give a constitutional and legal character to the protection by means of a constitutional and legal proceeding has not been exercised. This is not the only relevant issue. Another issue is that through such constitutional positioning, the freedoms and rights of humans and citizens are protected only in a certain area, while in another area, i.e. when it comes to prohibition of discrimination, it only provides protection to citizen. When it comes to this approach, there is no answer as to why there is a difference between the human and the citizen, when the obligation taken over from the ECHR is that it is under the competence of the given country, RM in this case, to provide and protect the rights and freedoms laid down in ECHR and its protocols (Article 1 from the ECHR) to everyone. In addition to this are undoubtedly the values and principles already elaborated in the Preamble of ECHR.

There was a possibility to settle the issue with this restrictive and limited approach and change it by enabling the functioning of the remedy - constitutional appeal, at the time when an attempt was made to adopt certain amendments to the Constitution in the course of 2014. These draft-amendments proposed at the time caused quite a turmoil and were negatively assessed. The content of these amendments envisaged introduction of the instrument of a constitutional appeal, however the arguments provided in favour of it were not clear and concise at all - to the contrary they were very proposed with an overtly short, inadequate and ungrounded explanation and presented a state of confusion, especially with regards to the establishing of a system of parallelism and the need of effective and efficient legal remedies. It was good that Parliament did not put these draft-amendments on the agenda since they contained many elements of inadequate action, among which: the summary assembly proceedings in the absence of the opposition and not holding a public hearing and expert debates on the content of these amendments[63]

With regards to the parallelism in the area of the existing remedies for protection of human rights, the question is raised of whether it is necessary to have a remedy for the above-mentioned protection both before the regular judiciary in civil, criminal, misdemeanor and administrative proceedings, as well as before the Constitutional Court. If we analyze the practice of ECtHR, as well as the practice certain legal systems, and the theoretical and scientific-academic approach, it would not be unprecedented to establish the possibility for protection of the rights and liberties in the presented directions, meaning that this protection can be exercised by means of several legal remedies. It is up to the interested party to chose which remedy to use in a situation when there is no legally prescribed fixed hierarchy in the procedure of reaching a decision which constitutes the final, ultimate intervention. This is, certainly, acceptable only in circumstances when there is no correlation in the utilization of the envisaged legal remedies.

[63] See the reaction of the Institute of Human Rights in relation to the draft-amendments to the Constitution of RM published on IHR's web-site: www.ihr.org.mk.

In this area, the constitutional appeal or the initial act for initiation of proceedings for protection of human rights and liberties before the Constitutional Court should be assessed as the necessary legal remedy for exercising this protection. This, above all, due to the fact, as was already mentioned, that fundamental rights and liberties, which are a constitutional category, are in question.

As for the possibility to directly protect the rights and freedoms in a procedure before regular courts in RM, we may conclude that it does exist. It is achieved through the given legislation in various areas of the law, whereby direct protection is provided through the Law on Obligations (LO) in the section on personal rights. The Law Amending LO, in Article 9 apart from protection of property rights also regulates the protection of individual rights, and that any natural or legal person is entitled to protection of their personal rights under the law. Paragraph 2 of this Article does not listed all of the personal rights but the substantive legal protection is possible considering the amendment to Article 142 of LO which harmonizes and supplements the notion of damage, so that apart from the regular damages and lost benefits as damage, it also covers damage caused by a violation of personal rights. This legal structure actually provides the possibility to remedy the situation which led to the damage, that the practice of the ECtHR is clear and decisive about. In this procedure, as in all other court proceedings, the judges have an obligation to properly apply the relevant case-law of ECtHR. Unfortunately no successful results can be detected in this field, with regards to the abovementioned possibility.

Does this mean that the opportunities for exercising protection of human rights and freedoms in regular court proceedings and the limited possibility to do so the Constitutional Court are counterproductive or is there something else in question !? It must be noted that by not practicing adequate treatment of the ultimate intervention to the given right or freedom and by adopting decisions that do not remedy the situation, the Constitutional Court completely discourages the interested parties to take advantage of the constitutionally provided opportunity. To this we should of course add the lack of trust in the independence and impartiality in the work of the judges which has been recognized by both the domestic and the international community.

The experience and practice of constitutional courts in the region are aimed so users can perform interventions in the final and effective decisions of national courts. This covers their repealing, annulment or modification by determining compensation for the committed violation of specified rights and freedoms. The decisions of the Constitutional Court should quote compelling arguments and reasons for the decision, as well as guidelines for further proceedings without compromising the principle of independence of the powers of the regular courts. The Constitutional Courts in their decisions emphasize that they are not courts of the fourth instance, and that do not delve into determining the actual situation and allow the opportunity for the regular courts to decide on the of the application of substantive law unless their actions are arbitrary. If they are, it is subject to assessment by the Constitutional Court.

In any case, it is necessary to make serious efforts to provide effective and efficient protection of human rights and freedoms in an appropriate constitutional and legal proceedings before the Constitutional Court, which is the guarantor of constitutionality in the country. By establishing the remedy of constitutional appeal, an additional and special control over the implementation of the Constitution is conducted, as well as the actions of the regular courts in this area.

The establishment of this remedy requires longer expert work both from a scientific and theoretical aspects as well as experiences in practice on both, the national level and international field, by applying the comparative principle. Of course, the necessary transparency requires a number of public debates, and they need to be organized in such as way as to give all interested parties the chance to meet and possibly contribute to the resolution of this important issue.

XII. CONCLUSIONS AND RECOMMENDATIONS

1. Independence

The majority of judges take great confidence in the answers sent to the Constitutional Court by the bodies which adopted the disputed regulation or other general act. This particularly applies to the responses received by the Parliament and Government that often sent identical letters containing the same answer to the Constitutional Court. Despite this practice, there is no official reaction on the part of the Court. The discussions of some of the judges raise suspicions that the cases are not assigned in alphabetical order, and that they are assigned by the Secretary General of the Court. This raises the possibility for manipulation when assigning cases. The Constitutional Court sometimes adopts decisions diametrically opposite to the previous case law of the Court, even from its own practice. A typical example of this is the rejection of the initiative on the Decision to Dissolve the Assembly when the applicant was an MP from opposition party and then repealing the same decision when the applicant was an MP for the ruling party. The action taken on initiatives that go in favor of the ruling majority is by far faster than those that might be to its detriment. The initiative to abolish the Law on Pardon was processed in as quickly as 40 days as of the submission of the initiative until the adoption of the final decision.

Recommendations:

1. Upon obtaining the responses sent by the bodies which adopted the disputed regulation or another general act, the judges to take a critical stance and not take them as valid facts before they run the necessary checks.
2. The Constitutional Court to take adequate reaction if the answers from two or more different institutions are identical.
3. The Constitutional Court to start using a software for automatic deployment of cases by random choice which should lead to a decrease in the possibility for manipulation while assigning cases.
4. Constitutional judges enjoy complete independence, under the protection of the Constitution and its Rules of Procedure. This should serve as sufficient motivation to rise above the political or any other pressures in their work.
5. The Constitutional Court shall have equal access to all the received applications for initiatives and requests from citizens, to process the cases according to the principle of efficiency and effectiveness and not to give priority to cases that are not urgent, regardless of who the proponent or applicant is.

2. Expertise

A significant number of the judges do not meet the requirement of being a "distinguished lawyer". Although the report is submitted to all judges in writing, the judges-rapporteurs do not explain it in detail even in cases when there are members of the public in the courtroom. Without mentioning the applicant of the constitutional initiative or the submitter of the request for protection of the freedoms and rights of citizens and a summary of the statements, the public is unable to understand what exactly the discussions and decisions of the judges are about. A significant part of the judges do not approach their cases on the principles of urgency, efficiency and effectiveness. This attitude is particularly worrying when they are rapporteurs in cases of protection of rights and freedoms at citizens' request. The Constitutional Court often rejects initiatives because they are incomplete or because the contested provisions ceased to produce any legal effect. Sometimes the constitutional judges do not request a response from the authorities which adopted the contested regulation or other general act. Some judges sometimes make decisions diametrically opposite to what they had decided on in other cases and on the same or similar constitutional and legal issues. There is a great divide and sporadic impatience among some of the judges elected before and after 2011. In 2015 and 2016 the Constitutional Court held a single public hearing although the judges did not have the expertise to discuss and decide on social issues which are not always related to law.

Recommendations:

6. It is necessary for the judges-rapporteurs to explain their reports in more detail, especially when there are members of the public present in the courtroom. Without mentioning the applicant of the constitutional initiative or the submitter of the request for protection of the freedoms and rights of citizens and a summary of the statements, the public is unable to understand what exactly the discussions and decisions of the judges are about.
7. The judges to abide by the principles of urgency, effectiveness and efficiency, especially when they are rapporteurs in cases for protection of freedoms and rights at citizens' requests.
8. The incomplete initiatives as well as those containing provisions that are no longer part of the legal order must not be rejected with ease. The Constitutional Court has the opportunity to work on cases at its sole discretion and ex officio, and the judges should concentrate on the substance rather than the technical details of the contested provisions, and on whether those provisions were transferred to another act after they had been terminated or canceled.
9. Judges must remain consistent with the previous practice of the Constitutional Court and to the way of their own previous decisions. Changing the standpoints in the judicial or private practice must be thoroughly reasoned and substantiated with facts and information about the change of standpoint.
10. Personal intolerance and lack of communication and understanding during working meetings should not be taken into the courtroom and affect the decision-making on the cases.
11. More frequent public hearings where experts from several areas would be invited is necessary and would contribute to the multidisciplinary approach of the Constitutional Court in its decision-making.

3. Impartiality

Some judges sometimes base their decisions on their personal views and opinions which can lead to bias in the work and decision-making. One judge believed that his report should not rely on judicial practice that would not be in support of his views. Another judge had not supplied all the documents sent by the body that adopted the contested regulation. Typically, the President of the Constitutional Court allows the expert associates who worked on the report to have an address during sessions, but one of the most experienced associates was not allowed to do so.

Recommendations:

12. Judges should avoid providing their personal views about the potential benefits of the contested regulations but considered those regulations through the point of view of their compliance or non-compliance with the Constitution and/or laws.
13. Judges must transcend their personal beliefs and be free from all prejudices and to distance themselves from their relationships or opinions on the applicants of the initiatives and requests.
14. All the responses and documents that the judge-rapporteur receives must be attached to the report on the case so that all judges could have insight into the materials that their vote may depend on.
15. The President of the Constitutional Court should make it possible for all professional associates who had worked on the reports to be able to address the session, as well as those associates who have previous knowledge about the disputed regulation or general act.

4. Transparency

Until 2014, the Constitutional Court was one of the most transparent institutions in the country, allowing audio and visual recording of its sessions by the media and appointing a person for public relations. This is no longer the case, and had led to the Court becoming closed to the public. The Constitutional Court does not provide information on the possibility for citizens to attend its work during the sessions. Judges present scant reports even when working on cases that have stirred great interest or public anger. Sometimes the Constitutional Court holds sessions that are closed to the public without explaining how and for what reasons it has made such a decision.

Recommendations:

16. The Constitutional Court should consider returning to the former practice of allowing audio and visual recording of its sessions by the media. If a large number of camerapersons distract the attention of judges, a system of issuing recording permits to one or several cameras on a rotation system should be taken into consideration, in accordance with the requests from the media. Alternatively, the Constitutional Court could provide equipment for video transmission (live or soon after the session is held) over the Internet.
17. The Constitutional Court should appoint a person in charge of public relations who, like before 2014, will communicate with journalists and other interested parties and will hold regular briefings to present the ongoing work of the Court and will answer questions related to the scope of the Constitutional Court.
18. The Constitutional Court, on its website, through brochures and other promotional materials should regularly inform the citizens about the possibility to attend the court sessions in the courtroom.
19. Constitutional judges should explain their reports in detail and commit to a more comprehensive debate on the initiatives submitted by a large group of people or on topics that have caused great interest or public anger.
20. The decisions to close the session to the public should be adopted by the majority of judges and in writing, containing a detailed explanation of the reasons why a certain session is closed.

5. Protection of citizens' freedoms and rights

The number of requests for protection of rights and freedoms by citizens constantly declines from year to year. In its 24-years of work, the Constitutional Court has received about 300 requests, yet only one was accepted. This indicates that this legal institute is not an effective remedy in the legal order of the state. Although the Rules of Procedure of the Constitutional Court stipulate holding public hearings when deciding on requests for protection of rights and freedoms, this does not take place in practice.

Recommendations:

21. The Constitutional Court must regain the trust of the citizens who believe that some of their constitutional freedoms and rights have been violated.
22. The Constitutional Court should comply with Article 55 from its own Rules of Procedure which stipulates that, as a rule, the Constitutional Court decides on protection of freedoms and rights on the basis of holding a public hearing.
23. The way requests for protection of freedoms and rights are processed should strive to reassure the public that the Constitutional Court is ready to implement the proposed "constitutional appeal".
24. Organizing a broad and comprehensive, public and expert debate on the introduction of the instrument of "constitutional appeal" in the legal order of the country.