

**Different Models for Protection of Constitutionality, Legality and Independence of
Constitutional Court of the Republic of Macedonia**

1. About the different models of protection of constitutionality and legality

The Constitutional Court is a separate body that serves as a watchdog of the constitution in a given country, and as a protector of the constitutionality, legality, and the citizens' freedoms and rights within the national legal system.

From an organisational point of view, there are several models of constitutionality that can be determined, as follows:

1. American model based on the Marbery vs. Madison case (Marbery vs. Madison, 1803), and, in accordance with the John Marshall doctrine, according to whom the constitutional issues are subject of interest and resolution of all courts that are under the scope of the regular judiciary (in an environment of decentralised, widespread of dispersed control procedure), and based on organisational procedure that is typical for the regular judiciary (incidenter). And while the American model with widespread system of protection of constitutionality gives the authority to all courts to assess the constitutionality of the laws, the European model concentrates all the power for the assessment of the constitutionality on one body. In Europe, there are number of countries that have accepted the American model, such as Denmark, Estonia, Ireland, Norway, Sweden, and in North America, besides the U.S., this model is also applied in Canada, as well as, on the African continent, in Botswana, Gambia, Ghana, Guinea, Kenya and other countries.²

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² In Asia this model is applied in Fiji, India, Japan, Malaysia, Nepal and others, in Central and south America in Argentina, the Bahamas, Barbados, Bolivia, the Dominican Republic, Mexico and others. See: www.concourts.net/introen.php

2. The new (British model) of the Commonwealth. This model cannot be classified neither as American, nor as European. Typical for this model is that the procedure for protection of constitutionality and legality lies with the highest court in the country composed of regular judges who are not politically nominated. By default, this model in largest proportion executes preventive control of the constitutionality, although in certain cases it initiates repressive control over the constitutionality. The decisions which are adopted by the highest (supreme) court in this model have an *erga omnes* effect.

3. "Austrian" (continental) model for protection of constitutionality and legality. This model is based on the 1920 Kelzen theory. According to this theory, there is a mutual dependence between the principle of supremacy of the Constitution from one, and the principle of supremacy of the Parliament from the other side. The constitutional issues, according to this model, are reviewed and resolved by a separate, specialised body called Constitutional Court, whose composition includes judges who are qualified to decide on constitutional matters³, or by the highest regular courts⁴, or by the special boards within the regular courts that work exclusively on constitutional matters in a separate procedure. The decisions that are adopted by these courts have an *erga omnes* effect, regardless if it is a matter of preventive or repressive control of the constitutionality, i.e. legality. According to Kelzen, the specialised body that will protect the constitutionality and legality in a given

³ In Europe, the following countries have accepted this model of organisation of constitutional courts: Andorra, Albania, Bosnia and Herzegovina, Belarus, Croatia, The Czech Republic, The Republic of Macedonia, Germany (with 12 regional constitutional courts in Baden-Wurtemberger, Bavaria, Brandenburg, Bremen, Hamburg, Hessen, Niedersaschen, Nordhain-Vestfallen, Rainland-Falz, Saarlend, Saschen and Sachen-Anhalt), Hungary, Italy, Lithuania, Latvia, Luxemburg, Malta, Poland, Russia, Slovenia, Slovakia and others.

With regard to the qualifications of the judges, it is interesting to mention that most of the constitutional judges in Europe come from the line of university professors in constitutional law. For example, in Spain the constitutional judges are elected from the line of university professors in law, lawyers, public prosecutors, state officials that have professional experience of at least 15 years in the field of the law.

In Spain, the constitutional judges appointed from the line of university professors are usually constitutional law professors who published their opinions about the most problematic areas of the Spanish constitutional model, starting from the basic and personal freedoms and rights, all the way to the territorial division of power.

The main issues related to the territorial aspects that are subject of review by the Constitutional court in Spain are: 1. the concept of self-management of the regions; 2. supremacy of the national over the regional legislation; 3. the concept of basic government services; 4. the domain of legislative harmonisation; 5. the contents of the state law. The constitutional Court of Spain, according to the decision no. 76/1983, increased the independent authority of the regions calling on the article 150.3 of the Law for harmonisation, which stipulates that the national government "can ask for adoption of laws in the areas delegated to the regions when that is necessary for equal application of the law in the country overall." According to the court, the harmonisation law is a constitutional mechanism which the national government can use only in cases when no other tool is possible to be applied, because it would mean intervention in the national authority in the areas which are under the competence of the autonomous regional authorities." For more details see: **Enrique Guilen Lopez Judicial Review in Spain: The Constitutional court, Loyola of Los Angeles Law Review, vol 41: 529, 2008. Also, see for more details: Andre Lecours, Regionalism, Cultural Diversity and the State in Spain 22 J Multilingual & Multicultural dev. 210, 213 (2001).**

⁴ In Belgium that is the arbitrary court in Brussels, Iceland, Monaco, Kosovo, Lichtenstein.

country ought to include independent persons (individuals), most often university professors in constitutional law, who will be able most objectively to assess if the laws that are adopted by the Parliament are in accordance with the Constitution of the country. For Kelzen, the Constitutional Court ought to act as a "negative legislator" that is authorised to annul or terminate the laws or some of their parts that are not in accordance with the supreme legal act.⁵

4. Combined (American-Continental) model. This model has elements both from the widespread and from the concentrated system with wide authorities of the constitutional or supreme courts⁶.

5. French (continental) model. This model is based on the French Constitutional Council from 1958, where resolving of constitutional issues is under the competence of separate bodies (constitutional councils) or under the competence of specialised chambers within the supreme courts⁷.

2. The model of protection of legality and constitutionality in the Republic of Macedonia

The 1991 Constitution of the Republic of Macedonia accepts the European (continental) model of protection of constitutionality and legality because this protection is provided by a specialised body, the Constitutional Court of the Republic of Macedonia, which is a state body, and which, according to its status, does not fall under the system of division of power.

The Constitution defines the position of the Constitutional Court, its composition, competence, functions and immunity of the judges, as well as the legal effect of its decisions. According to Article 113 of the Constitution, the manner of work and the procedure in front of the Constitutional Court is determined with an act of the Court⁸.

⁵ See: **Michel Rosenfeld, Justice Sydney L. Robins Professor Of Human Rights Cardozo School of Law, Constitutional Adjudication In Comparative Perspective: The European Model as Against The American in Terms of Politics Law and Interpretation,** <http://www.aals.org/profdev/constitutional/rosenfeld.html>.

⁶ This model is applied in Portugal, Greece, Switzerland, Taiwan, Peru, Guatemala, Columbia, Venezuela and others.

⁷ This model is applied in France, Algiers, Morocco, Mozambique and others.

⁸ See: **Constitution of the Republic of Macedonia, Official Gazette of R. Macedonia, Skopje, 2005 (p.119). the Rulebook of the Constitutional Court of the R. Macedonia is adopted on 7 October 1992.**

The protection of constitutionality and legality is not some kind of a state power, but an autonomous and independent function. The realisation of the competences of the Constitutional Court of the Republic of Macedonia stands beyond the relations between the holders of the legislative and the executive government.

Hence, the Constitutional Court is one of the key factors for the implementation of the Constitution. It is this court that analyses the process of construction and realisation of the relations between the two governments, as defined in the Constitution. This body, same as all other constitutional bodies, represents a constitutional institution whose main functions and scopes of work are determined in the Constitution and are in function of their realisation. This position of the Constitutional Court guarantees that the conditions for fulfilment of the constitutional-judicial function are already protected from any influence from the holders of the political power.

But, from the other side, the constitutional status of the Court enables it to distance itself from the political authorities while performing its constitutional-judicial function, because the Court has a continuous and stable position when presenting its own independent position in time of change of the holders of the government.

3. About the need of reforms of the Constitutional Court of the Republic of Macedonia

a) A need from a Law for the Constitutional Court of the Republic of Macedonia

The fact that there is practically no country in the world that has a Constitutional Court in its system that is not regulated with a law, or a constitutional law, above all, the statutory matters related with the constitutional court, opens the issue whether there is a need from this kind of a law in the Republic of Macedonia. This need is obvious. The experience of other countries shows that regulating of the status, organisation and the competences of the Constitutional Court must be organised with a separate law or by a separate constitutional law, due to the meaning and the character of these matters in the constitutional and legal system of the country⁹.

⁹ We should mention the experience of Slovenia, Croatia, Serbia, Austria, Spain, Romania, Bulgaria, The Czech Republic, Slovakia, Germany, Albania, Poland, Lithuania, Latvia, Armenia, Italy and other countries which regulate the matters that concerns the status, organisation and the competences of the Constitutional Court with a separate law.

The law on the Constitutional Court of the Republic of Macedonia will help in increasing the quality of defining the matters concerning the court which are currently regulated with an act (Rules of procedure) of the Court.

b) Change of the manner of nomination and the manner of election of the constitutional judges in the Republic of Macedonia

The system of nomination and appointment of constitutional judges must provide balance in order to guarantee independence from any political influence as well as independence of the judges, to guarantee high level of expertise and qualifications of the judges elected for this duty, to provide broad spectrum of knowledge, experience and culture in the court, and political sensibility which should in any case undermine the independence and impartiality of the judge.

The need of greater inclusion of experienced judges in the Constitutional Court or recognised and distinguished retired judges from the Supreme court or from the appellate courts who have broad experience in executing their judicial functions represents a good model for reforming the composition of the Constitutional Court. Also, the need of inclusion of distinguished university professors in law in the composition of the Constitutional Court will enhance the role of this very important body. The need of demanding greater professional qualifications in the process of election of constitutional judges as well as the long-year experience in the field of the law also represents a very important criterion for election of constitutional judge.

Comparative analysis of the election of the constitutional judges reveals that there are two main systems of appointment of constitutional judges, plus an additional, combined model, which represents a combination of the previous two.

The first system is the system of direct appointment, whereat no election procedure is involved (for example, the system applied in Canada, Finland, France, Ireland, Lithuania, Norway, Sweden, turkey and other countries.) this system can be divided on two subgroups.

For the first subgroup, the power of appointment is a discretionary right of a given institution (France, Lithuania, Turkey). In France, thee appointment of constitutional judges is equally divided among three judges who are appointed by the President of the State, the Senate and the National Assembly. In Lithuania, the President of the country, the Parliament and the Supreme Court appoint per three judges each. The President of Turkey appoints the

judges of the Turkish Constitutional Court, but on a special quota of candidates coming from specific legal professions.

For the second subgroup, the power of nomination of candidates for constitutional judges is related with previously submitted proposals coming from other bodies (the prime ministers of Sweden, Finland, Sweden, Ireland). For example, the Republic of Ireland has a special advisory board for judicial appointments whose recommendations must be taken into consideration when constitutional judges are appointed. In Finland, the Constitutional Court itself proposes candidates for future judges, and the president of the state appoints the new judges based on prior consultations with the minister of justice and the Council of Ministers.

The second system is the electoral system, which is considered as more democratic than the previous one. The election of constitutional judges is most often executed by the parliament (the case of Hungary, Latvia, Portugal, Slovenia, Germany and others.) In the case of Germany, the Bundestag elects only one-half of the constitutional judges in an indirect manner, i.e. through the Committee for judicial appointments, which is proportionally composed of members of the Bundestag. In Portugal, ten of the permanent 13 judges are elected by the Parliament. The difference in the electoral systems that exist in different countries is in which institution nominates the constitutional judges. The proposals can come from the president of the country (Slovenia, Azerbaijan), the upper house of the parliament (Croatia), combined proposal from the parliament, the executive government and the supreme court authority (Latvia), or the judicial council (like in the case of the Republic of Macedonia), or the proposals can come from the parliamentary political parties (Lichtenstein¹⁰.)

The third system is the so-called hybrid system, which represents a combination of the previous two.

This system is most common and has developed several alternative types. In some countries, the electoral element can have equal weight as the element of appointment (the case of Austria), but most often the electoral component is more important than the appointment (the case of Albania, Armenia, Romania, Spain and other countries). With the hybrid system, the authorities that nominate constitutional judges, such as the judicial bodies or the judicial councils, can also directly appoint judges (the case of Bosnia and Herzegovina, Bulgaria, Italy and other countries).

¹⁰ See: **European Commission for Democracy Through Law, Venice Commission, Revised Report on the composition of Constitutional Courts**, <http://www.venice.coe.int/docs/1997>

It is believed that the system in which the election of the constitutional judges does not depend only on one segment of the state authority, i.e. the system where all segments of the state authority (legislative, executive and judicial) are involved in the election of constitutional judges is the most democratic system which has the highest level of legitimacy.

The second system includes those countries in which the parliament is the only body that elects constitutional judges, and the decision for their appointment is adopted by qualified majority of members of parliament, i.e. with the same majority needed for amending the Constitution¹¹. In this respect, there are three main models in the election of constitutional judges: monocratic, majority and supermajority model.

Therefore, according to the majority of theoreticians, the best manner for election of constitutional judges is when all three segments of the government (legislative, executive and judicial) are equally involved in the process of election of the constitutional judges. Also, the duration of their mandate is also a very important segment for the election of the judges. The constitutional judges usually have much longer mandate, without the right to re-election. Mandate of nine years is most common, as well as the provision for one-third of the judges to be replaced on every third year.

c) Determining responsibility for the work of the constitutional judges

The main principle on which the constitutional democracy is based upon is the **principle of responsibility** for all segments of the government, and especially for the judicial government. Having in mind the importance of the Constitutional Court as a state body in the Republic of Macedonia, it is easy to note the necessity of determining a higher level of responsibility for the constitutional judges, especially since they have the power to annul or cancel laws that have been adopted by the Assembly of the Republic of Macedonia as a house of representatives of all citizens of the country.

In many east and central European countries, there are considerations for the need of removing the absolute power of the constitutional courts to perform abstract control of the constitutionality of the laws, and to introduce broader model of assessing the constitutionality.

¹¹ In Germany, Poland, Lithuania, Hungary, Slovenia, Russia, Croatia, it is the parliament that elects the constitutional court judges. There are certain characteristics in the manner of election in each of these countries. For example, in Slovenia the President of the state has a sole right to nominate candidates for constitutional judges, who are then elected by the parliament. In Poland, all 15 constitutional judges are elected by the parliament, and then the president of the state appoints the president and the vice-presidents of the constitutional court, who come from the candidates proposed by the constitutional judges themselves. In Hungary, all 11 constitutional judges are elected by the parliament with two-third majority of MPs.

Also, in some countries, there is a possibility for non-applying of the decisions of the constitutional courts and these decisions to become subject of assessment by the house of representatives if qualified majority of representatives ask for this. For example, the Polish Parliament can annul the decisions of the constitutional court with two-third majority of votes from the MPs, i.e. with the same majority of MPs needed for constitutional amendments. This system allows the legislator to annul the decisions of the constitutional court in order to protect its policy in a situation when the constitutional court is becoming too involved in the process of policy making. The same is happening in Romania, where the Parliament can annul the decisions of the Constitutional Court if that initiative is supported by two-third majority of the MPs in both houses of representatives¹².

4. Conclusion

There is a stance in the constitutional theory that the Constitutional Court has important functions in the consolidation and harmonisation of the democratic government in a given country. The Constitutional Court plays an important role in the "reviving" of the highest legal act in the country as an act that shapes and directs the political government. However, it is a fact that not all constitutional courts can achieve this goal. Some of them become powerless structures when facing the power of the executive and the legislative government, some fail to win the respect of the public because they are becoming "dictators" of what the executive and legislative government ought to do, thus becoming "hidden politicians" who deny the will of the citizens.

The Constitutional Court of the Republic of Macedonia has a need of essential reforms, both in regard to the manner of nomination, as well as in regard to the manner of appointment of the constitutional judges, as well as legal regulation of the statutory matters of the Constitutional Court. There is also a need of introduction of a new processing instrument for protection of the rights and freedoms of the citizens of the Republic of Macedonia, both regarding the responsibility of the constitutional judges for their work, the qualifications and

¹² See: Sarah Wright Sheive, **Central and Eastern Europe Constitutional Courts and the anti-majoritarian objection to judicial review, Law and Policy in International Business**, <http://www.clas.ufl.edu/users/kreppel/pos6933/sheive.pdf>.

professionalism of the constitutional judges, their mandate and the process of replacement of one-third of the composition of the Constitutional Court every third year.