

The implementation of the ECHR and the need to extend the scope of constitutional complaint mechanism in North Macedonia

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ABSTRACT

This paper will discuss the constitutional relevance of the European Convention on Human Rights (ECHR), i.e. the manner how the constitutional judiciary of North Macedonia enforces its provisions. It is important to stress that the ECHR does not provide for a specific way to ensure the implementation of guaranteed human rights and freedoms. It is left to each country to create its own path which, on the other hand, points to the fact that the European Court of Human Rights (ECtHR) cannot act as a supra-national fourth court instance, or as a supra-national Pan-European supreme court. This means that constitutional relevance and the margin of appreciation are related to, and dependent on, each other. Moreover, this paper will analyse the implementation of the ECHR's provisions by the Constitutional Court of North Macedonia as well as the objective and pragmatic need to extend the normative scope of the legal institution of a constitutional complaint, in order to advance and strengthen the constitutional-judicial protection of the rights and freedoms of citizens guaranteed by the Constitution of North Macedonia.

KEYWORDS

European convention on human rights, European court of human rights, constitutional review, legal protection of human rights and the rule of law, constitutional complaint

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1. INTRODUCTION

The European Convention on Human Rights (ECHR) was signed in 1950 and entered into legal force in 1953. The ECHR is of particular importance within the context of international human right for several reasons: it was the first comprehensive treaty in the world in this field as well as one of the most sophisticated regional treaties for the protection of human rights across Europe; it established the first international complaints procedure and the first international court for the determination of human rights matters; it remains the most judicially developed of all the human rights systems; and it has generated a more extensive jurisprudence than any other part of the international system.¹ In addition, the ECHR has proven to be a very successful treaty. It is a ‘Constitutional instrument of European public order in the field of human rights.’² The ECHR, like any other international treaty, leaves it up to the discretion of its contracting parties to find the most suitable manner in which its provisions are to be given legal effect within their internal legal systems. While variations are numerous, it seems that the prevailing attitude among state parties to the ECHR is that the internal justiciability and the remedies offered by the domestic courts for violations of the Convention rights are the best way to secure the observance of their international human rights obligations.³ This alludes to the domestic margin of appreciation. The margin of appreciation is a doctrine that the European Court of Human Rights (ECtHR) has developed when considering whether a member state has breached the Convention. It means that member states have a degree of discretion, subject to Strasbourg supervision, when taking legislative, administrative or judicial action in the area of a Convention rights. The doctrine allows the ECtHR to take into account the fact that the Convention will be interpreted differently in different member states, given their divergent legal and cultural traditions. As the Council of Europe has observed, the margin of appreciation gives the ECtHR the necessary flexibility to balance the sovereignty of member states against their obligations under the Convention.⁴

The *sui generis* legal nature of the ECHR is also underlined in the jurisprudence of the ECtHR. The latter states that the purpose of the high contracting parties in concluding the ECHR was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but to achieve the aims and ideas of the Council of Europe. It established a common public order for the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideas, freedoms and rule of law.⁵ On the other hand, the ECtHR applies the ECHR. Its task is to ensure that States respect the rights and guarantees set out in the Convention. It does so by examining complaints (known as ‘applications’) lodged by individuals. Where it concludes that a member State has breached one or more of these rights and guarantees, the ECtHR delivers a judgment finding a

¹Steiner and Alston (1996) 786.

²Alston (2004) 757.

³Hasani, Péter and Riegner (2012) 122.

⁴Link 1., 1.

⁵Nastić (2015) 203–17.



violation. Judgments are binding: the countries concerned are under an obligation to comply with them.⁶

The remit of defining the legal position of the ECHR in national constitutions varies from state to state. The legal status of the Convention in each state depends on their respective constitutional systems and legislative choices.⁷ Some states attribute (a) a constitutional rank to the ECHR, as do Austria and the Netherlands.⁸ In some states, the ECHR has (b) a supra-legal position, as in France, Belgium, Spain and Portugal. In other states, the ECHR has (c) a legislative ranking, as in the United Kingdom. Where there are no explicitly written provisions, (d) the duty to implement the ECHR statutes arises from the case law of the respective constitutional court, as in Italy and Germany. For instance, the Constitutional Courts of Spain and Portugal run an *ex-ante* or preventive judicial review power over the constitutionality of international treaties. When conflicts arise in Spain, the Constitution must be amended before the stipulation of the treaty. In Portugal, in order to be ratified a treaty must be approved by the Assembly of the Republic by a special parliamentary majority. Article 5 of the Constitution of the Republic of Bulgaria recognizes a general precedence of international law (including the ECHR and European Union Law) over national law. It covers the duty to interpret national law in a manner consistent with these regimes, and in the case law of their respective courts.⁹ In 1998 the Bulgarian Constitutional Court (Official Journal No. 22, 24 Feb, 1998) ruled that ‘The Convention constitutes a set of European common values which is of a significant importance for the legal systems of member states and consequently the interpretation of the constitutional provisions relating to the protection of human rights has to be made to the extent possible in accordance with the corresponding clauses of the convention.’¹⁰ In doing so, States open the door to the development of practices (mechanisms) designed to promote the effectiveness of the ECHR in the national legal orders. Judges may assert a new, or more robust, authority to review the conventionality of legislative and administrative acts; and executives and legislators may evolve new procedures for scrutinizing, *ex ante* and in-house, the compatibility of new law with Convention rights.¹¹

Meanwhile, Article 118 of the Constitution of the Republic of North Macedonia stipulates that ‘International agreements ratified in accordance with the Constitution constitutes part of the internal legal order and cannot be changed by law.’ It arises from the linguistic and legal meaning of that provision that an international treaty, signed and ratified in compliance with the Constitution takes the place in the domestic legal order directly ‘after the Constitution’ and ‘before the law’. Consequently, this provision confirms the will and lucid intention of the constitution-maker that the Constitution (*lex superior*) retains its legal supremacy over all other general normative legal acts, including international treaties ratified by act of parliament. Namely, within the normative hierarchy of formal municipal sources of law in the constitutional order of North Macedonia international treaties have priority over laws and other acts of public

⁶Link 2., 8.

⁷Gerards and Senden (2009) 636–37.

⁸Martinico (2012) 403–12.

⁹Cozzi and Sykiotou (2016) 10–15.

¹⁰Martinico (2012) 408.

¹¹Keller and Stone Sweet (2008) 22.



institutions, i.e., a supra-legislative but infra-constitutional status. Thus, the ECHR enjoying superior legal authority over statutes.

Twenty five years since the ratification of the ECHR by law by the Parliament of the Republic of North Macedonia, the frequency of use of the provisions of the Convention was relatively marginal (low), as were citations by courts in all instances. In fact, no decisions were taken by national courts that referred directly to any provision of the ECHR. Even the Constitution of North Macedonia provides a legal opportunity and authorization for the courts to adjudicate on the basis of the Constitution, laws and international treaties ratified in accordance with the Constitution (Article 98 of the Constitution of North Macedonia).¹² This includes the Constitutional Court as a separate, autonomous and special type of state organ which is not classified under any of the three branches of state power (legislative, executive, or judiciary). It is thus detached from the tripartite system of separation of state powers. The first and chief function of the Constitutional Court is the judicial review of constitutionality and legality of general normative acts, and their formal and substantive compliance with the Constitution and laws, as well as the constitutional-judicial protection of rights and freedoms of citizens entrenched in the Constitution.¹³ In relation to the enforcement of the ECHR it can be concluded that the Constitutional Court of North Macedonia explicitly refers to it and to the case law of the ECtHR only in an insignificant number of cases. Of the 823 decisions concerning the implementation of the ECHR, less than 0.5% of the decisions explicitly referred to the judgments of the ECtHR. In general, an analysis of the decisions of the Constitutional Court of North Macedonia that refer to the ECHR (with or without addressing ECtHR case law) reveals that the Constitutional Court applies these norms and principles selectively and mechanically. At the same time, it seems that the Strasbourg case law standards and practices are used in a formalistic manner without a substantive analytical approach.¹⁴

2. THE IMPLEMENTATION OF ECHR PROVISIONS BY THE CONSTITUTIONAL COURT OF NORTH MACEDONIA

The ECHR had been ratified by the Assembly of the Republic of North Macedonia in 1997, in conformity with the above explained Article 118 of the Constitution of the Republic of North Macedonia. For a very long period of time, the Constitutional Court of the Republic of North Macedonia was dominated by the view that the ECHR and ECtHR jurisprudence, as well as other multilateral normative instruments can only be taken as a complementary supportive argument in interpreting the constitutional norms, when deciding about the issues within the limits of the jurisdiction prescribed by the Constitution. Meanwhile, the Constitutional Court emphasized that the ECHR, although part of the domestic legal order, could not be taken as a direct and separate source of law on which to base judicial decisions. This applies equally to the abstract normative judicial review of constitutionality and legality as well as to the direct constitutional-judicial protection of freedoms and rights of citizens guaranteed by the

¹²Камбовски (2002) 172.

¹³Шкарик (2015) 931–32.

¹⁴Lazarova-Trajkovska and Trajkovski (2006) 287; Milenkovska (2018) 26–27.



Constitution of North Macedonia. Subsequently, the subsidiary application of the ECHR, as well as other international human rights acts, took the form of ‘as it is in’ the convention, the charter, or pact in order to support the viewpoint of the Constitutional Court. That could have meant, of course, that the Constitutional Court of North Macedonia was free to use the Convention only when it was in favour of its standpoints.¹⁵ Generally, it can be said that court practice or jurisprudence has shown that the national courts are not relying on the ECHR as much as they should be. This also applies to the Constitutional Court of North Macedonia, that has the task, *inter alia*, to decide upon requests for protection of rights and freedoms as well as submitted initiatives concerning the constitutionality and legality of general normative acts, in light of the Constitution and the laws. The first argument towards the resistance or reservation by the Constitutional Court of North Macedonia was the fact that it regarded the ECHR as an additional source of arguments in the interpretation of the provisions of the Constitution of North Macedonia.¹⁶ However, a newer approach of the Constitutional Court of North Macedonia to the interpretation of Article 8, paragraph 1, item 1 of the Constitution of North Macedonia underlined in 2006 that constitutional freedoms and rights should be interpreted in the light and spirit of the ECHR. Thus, the basic freedoms and rights of the individual and citizen recognized in international law and laid down in the Constitution are fundamental legal values of the constitutional order. This meant that the provisions of the ECHR should be used not only as supplementary arguments, but also as a criterion for interpreting and applying the constitutionally provided human rights in cases where the provisions of the Constitution of North Macedonia and the ECHR concur.¹⁷

This case was a particular one, in which the Constitutional Court was dealing with a situation where the ECHR was utilized for defining the constitutional right of peaceful assembly and the expression of protest as a non-absolute right. However, according to the Constitution of North Macedonia, the latter could be regarded as an absolute right if Article 21 was considered in isolation. Pursuant to this article, the exercise of that right can be limited only during states of war or emergency. More accurately, the Constitutional Court accepted that paragraph 2 of Article 11 of the ECHR was complementary to Article 21 of the Constitution of North Macedonia. Additionally, the law that sets restrictions on the use of this right in strict accordance with Article 11, paragraph 2 of the ECHR does not contradict the Constitution of North Macedonia.¹⁸ Thereby, we should take into consideration that this interpretative approach has no relation to the context of Article 53 of the ECHR, which protects the level of human rights that exists according to legislation or any other treaty. This is because it is oriented towards defining the referred constitutional right and not towards its limitation. Here is the gist of the court’s analysis:

‘Despite the high ranking of freedom of assembly in the corpus of fundamental freedoms and rights of the citizen, the freedom of assembly is not an absolute right in European legal culture, as is evident from an insight into the regulations of many countries, as well as from international acts. This especially refers to the gatherings that are held in open-air public places where, due to the contact

¹⁵Спировски (2009) 47–48.

¹⁶Milenkovska (2018) 21–31.

¹⁷Спировски (2009) 47–48.

¹⁸Спировски (2009) 47–48.



with the outside world, it is usually regulated in a way to create the necessary preconditions for exercising the right to public gathering on the one hand, while preserving or protecting the rights and interests of others whose rights can often collide. It represents an expression of the general principle that freedoms and rights of others are the limit of the realization of the individual right and freedom, regarding rights and freedoms that may infringe on others' rights. Such approach is especially emphasized in the European Convention on Human Rights and Freedoms, which is considered particularly relevant for the domestic legal order. The absence of an explicit constitutional provision for the possibility of the restriction of the exercise of the right to peaceful assembly in regular or peacetime conditions, in the opinion of the court, should not be construed in the sense that the right to peaceful assembly in regular circumstances is an absolute right exercised without any limits, or without any respect for the freedoms and rights of others. Such a principle of absolute exclusivity does not exist either in European or in an international context. The Constitutional Court of North Macedonia considers that it cannot be established even according to the Constitution of the Republic of North Macedonia. As it appears from Article 8, paragraph 1, item 1 of the Constitution of the Republic of North Macedonia, among the fundamental values of the constitutional order are the fundamental freedoms and rights of man and citizen recognized in international law and established by the Constitution. Keeping in mind the importance of the European Convention on Human Rights and Freedoms not only as part of the internal legal order of the Republic of North Macedonia, but also because of the general principles it relies on and promotes, the Constitutional Court of Republic of North Macedonia finds that the interpretation of Article 21 of the Constitution of North Macedonia should rely on those general legal principles [...]. It is for these reasons that, in the court's view, any restriction on the exercise of freedom of public assembly must pass the test of proportionality. This is in order to strike a fair balance between the right of citizens exercising the freedom of peaceful assembly, and the rights and interests of other citizens. That is for any other values or the protected public interest as a legitimate objective of the restriction.¹⁹

The fundamental human rights designated by the Constitution of North Macedonia, which quantitatively includes one third of the text of the constitution, are inspired chiefly by the provisions of the ECHR. In fact there is a considerable degree of similarity, homogeneity and convergence between the catalogue of basic freedoms and rights of the individual and the citizen in both the Constitution of North Macedonia and the ECHR. Without any doubt the ECHR has exerted an enormous influence on the substantive content of the catalogue of basic freedoms and rights of a citizen in the Constitution of North Macedonia. In consequence, when the Constitutional Court exercises constitutional judicial power in concrete individual cases for the protection of constitutionality, *in concreto*, on the basis of rights and freedoms envisaged under Article 110, paragraph 1, item 3 of the Constitution of North Macedonia must take into account the norms of the ECHR which guarantee analogous rights or freedoms in correlation with the Constitution of North Macedonia.

The Constitutional Court of North Macedonia has a mandate to determine if any disputed law or act is, or is not, in accordance with the Constitution. It subsequently refers to any applicable provisions of the ECHR. In this manner certain ECHR rights are used as supplementary or supportive arguments related to the issue of constitutionality or the legality of any law that is subject to argument before the Constitutional Court. This should not be the sole basis or argument for referring to the ECHR in decisions delivered by the Constitutional Court of North Macedonia. This is not quite accurate, either, as the ECHR is an integral part of the legal

¹⁹ Спировски (2009) 48.



order. It may be applied directly in practice without referring to any domestic law or a particular provision.²⁰ In such cases the ‘analogous’ constitutional and conventional provisions constitute ‘a harmonious normative whole’.

An example of the above is Decision No. 39/2004 delivered by the Constitutional Court of North Macedonia related to the interpretation of constitutional norms. The court accented the following:

‘Although the European Convention on Human Rights is an integral part of the domestic legal order, its statues are below the Constitution. It cannot represent a direct legal ground on which the court could base its decision concerning the assessment of the constitutionality of an Act. Namely, the provisions of the European Charter on Human Rights as well as the case-law of the European Court of Human Rights can represent only additional arguments in the interpretation of constitutional norms which the court uses in deciding upon the constitutionality of the provisions of the law [...]’²¹

A significant step forward in the implementation of the ECHR by the Constitutional Court of North Macedonia was made with Decision No. 31/2006. It was a provision of the Act on peaceful assembly which had been annulled with respect to the right to assemble peacefully. The Constitutional Court used the ECHR to define the right to assemble peacefully as a right that could be subject to restrictions during peacetime. This happened despite the fact that the Constitution of North Macedonia prescribes that ‘The exercise of this right may be restricted only during a state of emergency or war.’ The Constitutional Court did not accept that this right, in normal circumstances, is an absolute right, and pointed out that ‘Such a principle of absolute exclusivity exists neither in the European nor in an international context.’ It explained its position by referring to Article 8, paragraph 1, item 1 of the Constitution of North Macedonia, which provides that basic freedoms and rights of the individual are recognized by international law, and set down in the Constitution as belonging to the essential values of the constitutional order. Hence the significance of the ECHR not only as part of the internal legal order of the country, but also because of the general principles on which it is based and it promotes. A couple of years later the Constitutional Court of North Macedonia went further concerning Article 8, paragraph 1, item 1 of the Constitution, when in its Decision No. 139 in 2010, with respect to the Act on electronic communications it clearly explained that: ‘The interpretation of the relevant constitutional provisions should be based on these general legal principles contained in the European Convention on Human Rights and interpreted in the case-law of the European Court of Human Rights in Strasbourg.’²²

Another relevant step towards the essential constitutionalizing of the ECHR within the constitutional system of the Republic of North Macedonia is of course the case in which the court decided on the constitutionality of the provisions of the Criminal Code that provide for a sentence of life imprisonment. The importance of this decision of the court is that for the first time the court explicitly refers to the case-law of the European Court of Human Rights. It takes

²⁰Уставен суд на Република Северна Македонија, Човековите права и основните слободи: односот помеѓу меѓународните, супранационалните и националните каталози во 21 век (2020) 2.

²¹Milenkovska (2018) 24–25.

²²Milenkovska (2018) 24–25.



them as a basis for its reasoning in the interpretation of the constitutional right to personal freedom:

‘The analysis of the recent case-law of the European Court of Human Rights regarding the sentence of life imprisonment (Leger v. France judgment of 11 April, 2006 and Kafkaris v. Cyprus judgment of the Grand Chamber of 12 February, 2008) shows that for the European Court of the Human Rights the sentence of life imprisonment is not disputable if the criminal legislation provides for the possibility of conditional release of the convict. From the claims of the complaint it follows that the claimant essentially disputes the sentence of life imprisonment from the aspect of Article 12, paragraphs 1 and 2 of the Constitution of North Macedonia. From the very content of this article of the Constitution it does not follow at all, in the opinion of the court, that this article provides any additional condition as to whether the restriction of human freedom, i.e. deprivation of liberty is time limited or unlimited, from where it could be concluded that the legislator is in principle free to prescribe a sentence of imprisonment that is unlimited in time, that is, which lasts until the end of the life of the convict. However, having regard to the importance of human dignity as a fundamental human value that enjoys universal protection, the court considers that such an additional condition which prohibits deprivation of liberty for the rest of a person’s life should be enshrined in the provisions of the constitution relating to the inviolability of the physical and moral integrity of man and the prohibition of any form of torture, inhuman or degrading treatment or punishment (Article 11 of the Constitution of North Macedonia), which in a certain way obliges the legislator to provide mechanisms that will enable the person sentenced to life imprisonment to regain his freedom.’²³

This new approach to the treatment of the ECHR and the practice of the ECtHR by the Constitutional Court of North Macedonia is important for the strengthening of the legal effect of the Convention. This is also relevant for the gradual acceptance by the legal community in North Macedonia that the Convention is composed of norms along with their interpretation given by the ECtHR. This will certainly allow a new light to glow during the process of defining what is truly constitutional in the field of human rights in North Macedonia.²⁴ On the other hand, there is some confusion especially in the elaboration of the meaning of the freedom of expression in the Constitution of North Macedonia and in the ECHR. Namely, the Constitution of North Macedonia explicitly prohibits restrictions regarding the freedoms of personal conviction, conscience and the public expression of thought. This leads to the conclusion that even in times of war and emergency, a derogation from these rights is not allowed. On the contrary, the Convention allows derogations from these rights in circumstances prescribed in it and monitored by the ECtHR.²⁵ Thus, the question that should be posed is whether the Constitutional Court can be put in the position to ‘ignore’ the Constitution as the supreme normative act in the state and to rely on the provisions of the ECHR instead? This practice would be quite dangerous because it can create a jurisprudence where the hierarchy between

²³Спировски (2009) 48–49.

²⁴Спировски (2009) 48–49.

²⁵These divergences between the Constitution of the North Macedonia and the European Convention on Human Rights were elaborated upon in Decision No. 27/2013 of the Constitutional Court, where the court used the ECHR in different cases to justify the fact that the freedom of expression can be subject to restrictions, even though the Constitution prescribes the opposite. The Constitutional Court noted that its boundaries should be sought in the wholeness of the Constitution and its provisions, thereby taking into account the international documents ratified in accordance with the Constitution.



norms can be misinterpreted or used in a wrong manner. Pursuant to the national positive law of North Macedonia, the Constitution is the supreme legal act in the state, meaning that the laws and international normative acts should be in conformity with the Constitution. In case of discrepancy between the Constitution and any international treaty, the Constitution will prevail over the treaty, i.e. the Constitution should be applied (the universal legal principle *lex superior derogat legi inferiori* – a provision with higher rank overrules a provision with lower rank).

3. DEFINITION AND MEANING OF THE CONSTITUTIONAL COMPLAINT

Over the past 70 years, a fundamental shift in the importance of the constitutional protection of human rights has occurred in Europe and beyond. Respect for human rights is now considered to be an essential part of any democratic society.²⁶ Namely, there is a tendency in democratic societies to give guaranteed rights and freedoms a real and not merely a declarative value, and to establish a legal system that can provide quick and efficient legal protection of all constitutional freedoms and rights from any violation or threat.²⁷ An increased awareness of human rights questions resulting from the abuse of state power by former regimes, and combined with the room to manoeuvre provided by a radical change in the political and constitutional system, has led to the introduction of existing legal mechanisms for the protection of constitutional rights and freedoms in these countries.²⁸

Different types of legal acts can be reviewed to ensure their conformity with constitutional norms. The European Commission of Democracy through Law of the Council of Europe, generally known as the Venice Commission, distinguishes between individual legal acts and general normative acts. Individual legal acts are any types of measure taken by a state actor (an administrative body or a court) deciding in a concrete case. General normative acts, by contrast, are general laws and rules that have the force of law. These include international treaties, decrees and regulations by the executive. They include general rules of local self-governing bodies that have a generally binding legal effect, i.e. without distinct or distinguishable addressees. In many countries applicants may directly petition a Constitutional Court either to review a normative or individual legal act with reference to their specific case, or to review a law abstractly by providing protection of constitutionality *in abstracto* through an '*actio popularis*' (where every person is entitled to challenge an act of the public powers after its enactment, without the need to prove that he or she is affected by the provision).²⁹

Direct access to a constitutional court enables the citizens to gain status as an autonomous personality vis-à-vis the state.³⁰ Different categories of applicants may be entitled to have direct access to constitutional courts concerning the protection of constitutionality *in concreto*. Most countries allow a natural person to lodge a constitutional complaint as long as they have standing. Several countries also confer legal standing on legal persons such as Austria, Armenia,

²⁶Harutyunyan, Nussberger and Paczolay (2021) 4.

²⁷Steinberger (1994) 8.

²⁸Dannemann (1994) 142.

²⁹Gentili (2011) 709–10.

³⁰Hartwig (1992) 469.



Belgium, Germany, Spain, Slovenia, Lithuania, Montenegro, Switzerland, Serbia, Kyrgyzstan, Russia and Turkey. Some even allow municipalities to lodge constitutional complaints, as do Germany and Russia. Only a few countries restrict individual access to constitutional justice to citizens such as North Macedonia and Russia.³¹

Individuals may lodge two types of constitutional complaints related to their specific case. These are full constitutional complaints and normative constitutional complaints. Full constitutional complaints concern the constitutionality of individual legal acts and any underlying normative act. Normative constitutional complaints concern the constitutionality of normative acts alone.³² The Venice Commission favours the full constitutional complaint (*Verfassungsbeschwerde; recurso de amparo*) not only because it allows for the most comprehensive protection of constitutional rights, but also because of the subsidiary nature of the relief provided by the ECtHR. That includes the primary pragmatic rational aim, accepting that domestic authorities are best placed to settle a human rights issue before they reach the ECtHR. This is especially relevant in view of an exponential growth of caseload of the ECtHR: some 59, 800 pending applications as of June, 2020.³³ The legal protection of human rights is becoming a defining and predominant feature of modern constitutionalism, and the constitutional complaint is one of the increasingly important legal institutions in the arsenal of human rights legal protection mechanisms.³⁴ According to Otto Luchterhandt, a constitutional complaint means that the fundamental rights guaranteed by fundamental law are not only 'loud declarations', but subjective rights a person can refer to directly. In such a case, an individual, armed only with the constitution, makes a challenge to the state and forces it to defend itself in court for its behaviour. From an historical point of view this is an incredible change both psychologically and legally.³⁵ A constitutional complaint is synthetically defined as a specific subsidiary means of legal protection of constitutionally guaranteed rights. This is accomplished mainly against individual legal acts of public power, which enables a subject, who claims that a certain constitutional right has been infringed, to initiate proceedings before the constitutional court on the constitutionality of a disputed legal act to have it annulled. Generally such complaints may only be filed if all legal remedies prescribed by the positive national law have been exhausted. This is a special legal instrument; a special type of right to legal protection embodied in the right to constitutional-judicial protection of proclaimed rights. The holders of such fundamental rights and freedoms exercise the opportunity to 'oppose' state power regarding unconstitutional decisions. The protection of human rights and freedoms through constitutional complaint does not absolve judicial protection as the dominant form of their protection but has a subsidiary character. The subsidiarity of a constitutional complaint is determined by the condition that it be filed after the exhaustion of all available legal remedies permitted by the national legal order. Its function is twofold; from a subjective perspective it protects the rights of the individual citizen, while objectively it protects the legal order as a whole.³⁶ So the primary function of a

³¹Harutyunyan, Nussberger and Paczolay (2021) 9–10.

³²Harutyunyan, Nussberger and Paczolay (2021) 10.

³³Harutyunyan, Nussberger, Paczolay (2021) 56.

³⁴Gentili (2011) 705–8.

³⁵Hultai (2018) 3.

³⁶Simović (2012) 203–22.



constitutional complaint is the protection of individual subjective rights guaranteed by constitutional law. It operates, at the same time, to safeguard the Constitution as a central component of the objective legal order.³⁷ There are opinions that the existence of a constitutional complaint has a ‘paradigmatic effect’ on the decisions and conduct of public servants and judges. The right of citizens to address the constitutional court directly should force public bodies to be prudent and not to exceed their authority (*ultra vires*). This in turn should strengthen citizens’ public trust in the functioning of the rule of law. This is a matter of the court acting in *inter partes* situations which deviates from the general *erga omnes* legal effect of constitutional court decisions. The constitutional court realizes a special form of the so called ‘review of micro-constitutionality’, i.e. the constitutional-judicial protection of certain specific constitutional right in concrete individual cases (protection of constitutionality *in concreto*), because it controls the enforcement of constitutional provisions in the field of human rights.³⁸

Rudiger Zuck, points out some crucial elements of the definition of a constitutional complaint. These are:

1. The constitutional complaint is a specific remedy; it is not a fundamental right *per se*;
2. The constitutional complaint is a legal instrument for the protection of human rights;
3. It is a legal instrument aimed at public authorities (acts of the legislative, executive and judiciary);
4. Can be used as a means to protect their own, and not someone else’s rights;
5. The statement of the applicant of the constitutional complaint that his/hers right has been violated is sufficient to use this instrument.³⁹ A constitutional complaint is generally characterized by four factors:
 - it provides a judicial remedy against any violation of constitutional rights;
 - it leads to separate proceedings which are concerned only with the constitutionality of the act in question, and not with any other legal issues connected with the same case;
 - it can be lodged by the person adversely affected by the act in question;
 - the court that decides upon the constitutional complaint has the authority to annul the act that it deems unconstitutional. Such annulment is indispensable to constitutional justice and it must be read as a corollary of the power of constitutional court to interpret constitution as a basic legal text of each state and to ascertain its violation.⁴⁰

From today’s point of view, if we analyse the substance of constitutional complaint, it is evident that is closely related to the principle of subsidiarity introduced in the European system for the protection of human rights and fundamental freedoms by Protocol 15 of the ECHR.⁴¹ Accordingly, the Strasbourg Court is not a pan-European Supreme Court⁴² or a ‘supranational fourth instance’,⁴³ and does not possess supranational decision-making powers. The principle of

³⁷Steinberger (1994) 86.

³⁸Pejić (1991) 141–51.

³⁹Trajkovska-Hristovska (2017) 93.

⁴⁰Dannemann (1994) 142.

⁴¹Protocol 15 ECHR amending the Convention on the Protection of Human Rights and Fundamental Freedoms, Council of Europe Treaty Series - No. 213.

⁴²Link 3.

⁴³Macdonald, Matscher and Petzold (1993) 41.



subsidiarity within the Convention system is to be understood as ‘complementary subsidiarity’ in the sense that the Strasbourg Court only intervenes where national authorities are incapable of effectively guaranteeing the rights of the ECHR. Within the context of the Convention system, the principle of subsidiarity means that the task of ensuring respect for the rights enshrined in the Convention lies first and foremost with the authorities in the Contracting States rather than with the ECtHR. The ECtHR ‘can and should intervene only where the domestic authorities fail in that task.’⁴⁴ Most importantly, unlike national constitutional or supreme courts, the Strasbourg Court does not possess the authority to invalidate national legal norms judged to be incompatible with the Convention. The absence of such authority constitutes a serious disadvantage to the extent that the regime is expected not only to render retrospective justice in individual cases, but also to construct Convention rights and to ensure their general effectiveness across Europe, prospectively. The ECtHR can count on the Council of Europe’s support of a robust doctrine of *pacta sunt servanda* (under Article 46 ECHR), and for the development of innovative approaches to systemic failures, such as pilot judgements. Such support, along with the good will and good faith of most States, should not be underestimated. The ECtHR would fail at its mission without them. Nonetheless, the ECHR is an autonomous legal regime. The ECtHR does not preside over a hierarchically constituted judicial system in which it exercises appellate review, or cassation powers, when it comes to decisions of national courts. Put differently, the ECtHR command and control capacities are weak, at best. They are primarily reduced to the ordering of compensatory damages to be paid in just satisfaction to successful applicants.⁴⁵

A constitutional complaint is a legal means that can be invoked mainly against the infringement of constitutional rights and liberties arising from individual administrative or judicial acts issued by the state. The constitutional complaint procedure before any national constitutional court is a specific point of reference which connects two systems; the European and the national legal systems.⁴⁶ This implies that under the conditions and circumstances of the existence of a national mechanism for a constitutional complaint it is logical to suppose that such a complaint becomes *ultima ratio*. This is the last national legal means to be used before applying to the ECtHR.⁴⁷ In this context the constitutional complaint has acquired the attribute and ability to act as the so-called national filter for cases before the submission of relevant individual applications to the ECtHR. The ability of an individual to have direct access to the body of constitutional justice⁴⁸ authority prevents the Strasbourg Court from being overburdened. The

⁴⁴Füglister (2016) 6–7.

⁴⁵Celler and Stone Sweet (2008) 13–14.

⁴⁶Nastić (2015) 203–18.

⁴⁷Article 35 paragraph 1 of the European Convention on Human Rights: ‘The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of four months from the date on which the final decision was taken.’

⁴⁸The individual constitutional complaint has been adopted in the following countries: Albania, Armenia, Croatia, Czech Republic, Estonia, Georgia, Hungary, Latvia, Montenegro, Poland, Serbia, Slovak Republic, Slovenia, North Macedonia, Ukraine, the Hellenic Republic (Greece), the Principality of Andorra, the Principality of Liechtenstein, the Republic of Cyprus, Republic of San Marino, the Republic of Azerbaijan, the Republic of China, the Republic of India, the Republic of Indonesia, the Republic of Korea (South Korea), the Republic of Mongolia, and the Republic of the Philippines. Gentili (2011) 726–32.



statistics provided by the ECtHR indicate that those countries where the mechanism for submitting constitutional complaints exists have a lower number of applications to the Court in proportion to population numbers than others in which there is no such mechanism.⁴⁹

4. THE NEED FOR EXTENDING THE NORMATIVE SCOPE OF THE CONSTITUTIONAL COMPLAINT MECHANISM IN NORTH MACEDONIA

The freedoms and rights enshrined in the Constitution of the Republic of North Macedonia can be legally protected before the Constitutional Court of North Macedonia mainly in two ways. The first is by initiating a legal procedure for assessing the constitutionality of a legal provision that restricts any constitutional right or freedom.⁵⁰ North Macedonia is one of the relatively rare states which allow any citizen of the country to challenge the constitutional validity of laws and other regulations before the Constitutional Court, through a popular action, as a form of citizen's constitutional action. ('Anyone can initiate a procedure for assessing the constitutionality of a law and the constitutionality and legality of a regulation or other general act,' Article 12 of the Rules of Procedure of the Constitutional Court of North Macedonia of 1992). It should be borne in mind that the aforementioned rights are afforded and applicable solely to citizens of North Macedonia from the perspective of their use in practice which do not apply to non-citizens.

The second is by submitting a constitutional complaint. This is a request for the protection of the freedoms and rights⁵¹ found in Article 110, paragraph 1, item 3 of the Constitution of North Macedonia when they are infringed upon by an individual legal act or action. The reason for a legal protection procedure before the Constitutional Court is a breach or limitation of the stated rights by individual legal acts of the public administration bodies or the judiciary.⁵² The jurisdiction of the Constitutional Court to ensure and accomplish protection of certain constitutional freedoms and rights of citizens has been constituted by, and arise from, Article 50 of the Constitution. It provides that 'Every citizen may plead the protection of freedoms and rights determined by the Constitution before the Constitutional Court of the Republic of North Macedonia through a procedure based upon the principles of priority and urgency.'⁵³

In the first case, the Constitutional Court may abrogate or annul the disputed provision of the law. Thus it can eliminate the normative basis for the approval of an individual concrete legal act that would directly limit a certain subjective right of a citizen in the future. For example, a legal provision that provides for different age limits for the termination of employment for a man and a woman. In the second case, when it is considered that a certain individual freedom or right of citizen has been infringed by an individual legal act, the Constitutional Court may determine that there is an infringement of the respective freedom or right, and thus annul the disputed legal act. On the other hand, this may only occur in cases of infringement of the

⁴⁹Harutyunyan, Nussberger and Paczolay (2011) 4.

⁵⁰Спировски (2017) 4.

⁵¹The term 'constitutional complaint' in this paper is used as a synonym of 'request for protection of freedoms and rights' as a universally accepted legal phrase in the contemporary culture of European constitutionalism.

⁵²Спировски (2017) 4.

⁵³Lopičić (2016) 29.



freedoms and rights unequivocally defined in Article 110, paragraph 1, item 3 of the Constitution of North Macedonia, which states that ‘The Constitutional Court of the Republic of North Macedonia protects the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion, nationality and social or political affiliation.’ In compliance with that, the rights prescribed by the cited article of the Constitution are granted solely to citizens. At the same time, the Constitution of North Macedonia determines a limited normative scope of direct constitutional-judicial protection: only three out of a total of 41 constitutionally guaranteed basic freedoms and rights fall under it.⁵⁴ That view is confirmed by Article 110, paragraph 1, item 3 of the Constitution. In light of that, it ought to be noted that other rights and freedoms of a citizen as guaranteed by the Constitution are *ex constitutione*, i.e. excluded from constitutional-judicial protection granted through the mechanism of a constitutional complaint, and that such requests will be dismissed by the Constitutional Court. Subsequently, the Constitutional Court is able to directly protect solely the freedoms and rights set forth *expressis verbis* (emphatically) in Article 110, paragraph 1, item 3 of the Constitution. Furthermore, the Constitution has adopted a system of positive *numerus clausus* (enumeration) of several specific constitutionally protected rights and freedoms. Nonetheless, this fails to solve the question of an opportunity of increasing the sphere safeguarded by the Constitutional Court to include other rights and freedoms of citizens considered significant. Indeed, this restrictive or narrow approach of a constitutional-judicial protection of the respective constitutional rights and freedoms was made without any serious justification or logical argument. The only explanation for this solution is based on the assumption that the constitutional complaint would lead to the risk of the Court being overburdened. That would, as a consequence, cause blocking and deluging of the Constitutional Court. The said rights and freedoms are, indeed, the most important rights and freedoms in a democratic society. Putting it differently, it remains unclear and without any rational explanation on what principle such a distinction was made among constitutional rights and freedoms. What were the criteria that inspired the constitution-maker to select certain concrete rights and freedoms of citizens from the catalogue of rights and freedoms guaranteed by the Constitution of North Macedonia? Thus, legal protection via a so called request for protection which may be qualified and treated conditionally as a quasi-constitutional complaint mechanism, is limited to these freedoms and rights.⁵⁵ In conclusion, it emerges that such a limited normative protective scope is constricting the domain of activity of the Constitutional Court, and makes the institutional logic of a request for protection of the freedoms and rights as a constitutional complaint devoid of sense. That is the reason why it seems quite justified to talk about the existence of a ‘fictitious’ constitutional complaint in such cases.⁵⁶ In this regard, freedoms and rights of citizens relating to the freedom of conviction, conscience, thought and public expression of thought is guaranteed in Articles 16 and 19 of the Constitution of North Macedonia. Freedom of political association and activity is basically guaranteed in Article 20. Political action also has complex aspects of freedom of expression, the right to peaceful assembly and expression of public protest

⁵⁴Saveski (2018) 632.

⁵⁵ПреШова (2019) 32.

⁵⁶Тренеска-Дескоска (2006) 270.



in Article 21. Participation in elections is an aspect of suffrage in Article 22. The right of every citizen to participate in the performance of public functions is contained in Article 23. Finally, the right of non-discrimination, i.e. the prohibition of discrimination among citizens on the grounds of sex, race, religion, nationality and social or political affiliation is guaranteed in Article 9. Hence, it is necessary in the request to state exactly which right or freedom stipulated in Article 110, paragraph 1, item 3 of the Constitution has been violated, and to indicate the specific article of the Constitution in which they are guaranteed as specified above.⁵⁷

It is often the case with such requests that the violated right or freedom is identified only by referring to Article 110, paragraph 1, item 3 of the Constitution of North Macedonia. For example, if an individual claims that his or her freedom of thought and expression has been violated under Article 110, paragraph 1, item 3 of the Constitution, without pointing to the specific substantive constitutional provision, it would be Article 16 where the freedom of thought is guaranteed. The Constitutional Court has an understandable tolerance for such requests. It is essential to underline that the grounds of discrimination in Article 9 and in Article 110 of the Constitution do not completely coincide, so the complementary reading of these two articles is permitted. Thus, for example, Article 9 determines, *inter alia*, social origin and social status as prohibited grounds for discrimination, while Article 110 adds social affiliation. In one case (Decision No. 125/2015 of 25.05.2016) the Constitutional Court decided on the issue of discrimination based on professional status by subsuming it under the concept of ‘social affiliation’ of Article 110, paragraph 1, item 3, rather than the substantive provision of Article 9. This is especially true for the individual freedom of political action which as such is mentioned only in Article 110, paragraph 1, item 3, and does not explicitly occur in Article 20. It was exactly through such a complementary reading of these two articles that the Constitutional Court made its only decision that found a violation of the right to political action of an individual in Decision No. 84/2009 of 10.02.2010.⁵⁸

Also, it is not enough to only formally state in the request that a freedom or right has been violated, with reference to Article 110, paragraph 1, item 3, when it in fact requires the protection of other rights enshrined in the Constitution, such as the right to property, right to social security, right to pension, or other rights guaranteed by the Constitution. In such a case, the Constitutional Court of North Macedonia is not competent to make a decision. Namely, as a rule, the Constitutional Court does not act as an appellate court, and does not assess the legality of the work of the courts or their decisions in various areas of specific cases for which it is not competent to decide. In fact, the Constitutional Court applies the Constitution of North Macedonia as a ‘criterion’ of control and does not decide on what the proper application of the law would be in other aspects. As a result, the Constitutional Court exercises subsidiary and specific normative constitutional control, and does not act as the fourth-instance court within the Republic of North Macedonia. It is not a super-revision state instance in relation to the national ordinary judiciary.⁵⁹ In summary, the constitutional judiciary, within the boundaries of its competence as determined by the Constitution, regarding a constitutional complaint does not exercise either the jurisdiction of the appellate court, nor the that

⁵⁷Спировски (2017) 6–7.

⁵⁸Спировски (2017) 6–7.

⁵⁹Спировски (2017) 6–7.



of the Supreme Court, but determines whether rights and freedoms of citizens guaranteed by the Constitution have been violated in the proceedings coming before the Constitutional Court.⁶⁰

During the procedure of providing constitutional-judicial protection, and within the limits of the request as laid out in the constitutional complaint, the Constitutional Court takes into account the evidence and facts established during the proceedings of the appropriate courts or other public bodies. It determines whether there has been a constitutionally impermissible infringement on a certain constitutional right in the procedure of deciding on the rights and obligations of individuals. In other words, the Constitutional Court does not review the merits, nor does it introduce new facts or evidence, which would reduce or suspend the competence of the ordinary judiciary. It adjudicates only on the basis of the facts established by the ordinary judiciary whether the constitutionally guaranteed right has been violated in the procedure in which the certain particular case was decided.⁶¹ In this context, one of the key differences between the work of the ordinary judiciary and the constitutional judiciary in terms of legal protection of human rights and freedoms is in the fact that the constitutional judiciary protect these rights through direct application of the constitutional norms, or through the norms coming from the separate constitutional normative acts that protect the human rights, while the protection of human rights by the ordinary judiciary is done through the direct application of the laws.⁶²

In addition, the Constitutional Court of North Macedonia does not provide an adequate general and comprehensive constitutional-judicial protection of the subjective constitutional rights of citizens, and it does not represent a 'last resort' that exercises control over the legality of court decisions and conduct either. At the very stage of determining its competence, the Constitutional Court examines a request in terms of its substantive allegations and argumentations, but not its formal features. A request can be founded only on the allegation that a certain specified constitutional right has been violated. The request is required to indicate which constitutional right has allegedly been infringed upon. Otherwise the Constitutional Court shall not accept the complaint if it finds that there are no constitutional normative grounds to initiate proceedings. For this reason, requests which in essence do not fall within the normative scope of the constitutional freedoms and rights under Article 110, paragraph 1, item 3 of the Constitution, are dismissed. The conditions for submitting a request for the protection of freedoms and rights found in Article 110, paragraph 1, item 3 as well as a procedure before the Constitutional Court are determined in the Rules of Procedure of the Constitutional Court of North Macedonia of 1992, Chapter 4 Articles 51 to 57. This would be done with an appropriate application of the provisions of Chapter 3 of the Rules of Procedure.⁶³ Under the Rules of Procedure, the Constitutional Court may grant direct constitutional-judicial protection to citizens in relation to the indicated freedoms and rights under two conditions. The first is that legal protection before the judiciary has been previously exhausted, or is infringed upon through a final or enforceable individual legal act. The second is that the request for protection is submitted within a time limit of two months (relative time limit) from the day the legal act was received, namely from the date on which the claimant became aware of the activity creating

⁶⁰Stojanović (2016) 35–51.

⁶¹Stojanović (2016) 35–51.

⁶²Karakamiseva Jovanovska (2018) 3–4.

⁶³Спировски (2017) 4.



such an infringement, but not later than 5 years (absolute time limit) from the day of the undertaking.⁶⁴ For the protection of freedoms and rights the Constitutional Court decides in a public hearing. With the decision for protection of freedoms and rights, the Constitutional Court defines whether there is an infringement. Depending on that, it annuls the individual act, prohibits the action causing the infringement, or refuses the request (Article 56 of the Rules of Procedure). The legal effect of the decision is *inter partes*, and in the decision, the Constitutional Court determines how to eliminate the legal consequences that emerged by the application of the individual legal act.⁶⁵

Observing objectively the effects of the request for the protection of rights and freedoms as a means of domestic law during 31 years of experience in North Macedonia, these are less than modest: i.e. they have resulted in a negligible number of complaints concerning human rights violations. Thus, the statistics are extremely discouraging for people's hopes to protect their rights and freedoms before the Constitutional Court. As of December 2020, of a total of about 330 requests the Constitutional Court accepted jurisdiction in about 50 cases. It found a violation of rights in 4 cases only, in one of which, related to the right to respect for private and family life, the Constitutional Court has no authority to decide. The other 49 requests were refused, and the remaining more than 250 requests were dismissed mainly due to incompetence, missing the preclusive deadline, or other procedural and administrative obstacles.⁶⁶

Statistical data on the operation of the Constitutional Court show that in comparison with the constitutional courts of other European countries, it has an exceptionally low activity or an inactive position *vis-à-vis* the constitutional-judicial protection of human rights.⁶⁷ In this regard the self-restrictions were applied by the Constitutional Court through a traditionally rigid interpretation when reading legal norms. This narrows the domain of action of the Constitutional Court even further, thus leaving an impression that it is not interested in playing the role of an ultimate institutional guardian of constitutional rights and freedoms within the state.⁶⁸ There is not only a tendency for self-restriction when the Constitutional Court acts in protection of human rights, but also an even more dangerous one visible in the decisions of the ECtHR, which stress that the Constitutional Court of North Macedonia has violated the rights and freedoms of citizens by its decisions.⁶⁹ The restrictiveness of the Constitution of North Macedonia regarding the jurisdiction of the Constitutional Court for the protection of freedoms and rights, the quality of requests for protection as well as the approach of the judges of the Constitutional Court both to these and the human rights substrate are factors that in their own ways certainly affect this condition. Nonetheless, the limits of this instrument and its ineffectiveness seem to contribute to a certain ignorance of the true nature of the request for protection of freedoms and rights, or the existence of a constitutional complaint in the Republic of North Macedonia. In any case, they give occasion to frequent proposals to amend the Constitution by radically extending the jurisdiction of the Constitutional Court to the direct protection of other constitutional freedoms and rights. It is thought that such an expansion of jurisdiction would bring North Macedonia to the majority of

⁶⁴Шкарик (2015) 945.

⁶⁵Risteska and Shurkov (2016) 14.

⁶⁶Цаца-Николовска and Спировски (2021) 32.

⁶⁷Karakamiseva Jovanovska (2018) 18.

⁶⁸Прешова (2018) 14–15.

⁶⁹Karakamiseva Jovanovska (2018) 20.



European countries in which, through a constitutional complaint, either the basic or even all human rights and freedoms enshrined in the Constitution are protected. That would inevitably affect the current ineffectiveness of the constitutional complaint.⁷⁰

It follows from the above observations that the indirect or implicit leitmotif of the ‘framers’ of the Constitution of North Macedonia, was to demonstrate and affirm that the Constitutional Court has a ‘priority’ focus—exercising the function of abstract normative control over the constitutionality and legality of general normative legal acts, as its vital (core) authoritative decision-making jurisdiction. By such regulation, the constitution maker has left the citizens without an opportunity for legal protection of their rights and freedoms (except for the abovementioned) by the Constitutional Court, in circumstances where they are affected by individual legal acts and therefore took away the possibility of an additional institutional mechanism for detection of unconstitutional legal acts in the national legal system.⁷¹ In this regard, it is important to underline that the Constitutional Court of North Macedonia is, realistically and practically, inefficient, i.e. it does not bring the expected and necessary results in a social and legal sense due to normative deficiencies or anomalies, and especially the extremely limited scope of its jurisdiction, as defined in the current Constitution. This imposes a pragmatic need for an effective legal instrument for the protection of rights and freedoms of the citizens of North Macedonia, which may be brought about by extending the normative protective scope of the constitutional complaint.⁷² A systematic and coherent solution would require a constitutional amendment to be passed by the Parliament by a two-thirds majority vote of all deputies (qualified parliamentary majority) in accordance with the legal procedure determined for amending the Constitution of North Macedonia.⁷³ This can be done by substituting item 3 of Article 110, paragraph 1 of the Constitution to incorporate an innovative content as follows: ‘decides on a constitutional complaint due to a violation of rights and freedoms of citizens guaranteed by the Constitution, when other legal remedies have been exhausted or are not prescribed or where the right to their judicial protection has been excluded by law.’ This could constitute a proper legal basis for the Constitutional Court’s operation as a competent state authority to decide on constitutional complaints, enhancing and strengthening the constitutional-judicial protection of citizens’ constitutional rights. At the same time, it could contribute to the consolidation of constitutional democracy. A wider scope of jurisdiction would allow the Constitutional Court to ensure a more inclusive constitutional-judicial protection for a wider range of constitutionally granted and prescribed rights and freedoms of citizens. It could also contribute actively and efficiently to their fulfillment in practice. Besides, deciding on a constitutional complaint serves not only the protection of subjective rights and freedoms of

⁷⁰Цаца-Николовска and Спировски (2021) 31–32.

⁷¹Trajkovska-Hristovska (2017) 94.

⁷²The extension of the spectrum of rights and freedoms that may qualify for protection before the Constitutional Court should not be perceived in terms of creating a problem regarding the efficiency of the procedure before the Court. Any possible overload of cases will be more efficiently prevented through the elaboration of substantive legal criteria for determining whether a complaint is or is not well founded. This can be done by the application of rules to determine whether or not a complaint is permissible by procedural criteria or other procedural rules to simplify the proceedings. cf. Прешова (2018) 14.

⁷³Article 129 of the Constitution of the Republic of North Macedonia (1991) states that ‘The Constitution of the Republic of North Macedonia is amended and supplemented by constitutional amendments.’



citizens granted by the Constitution on a national level, but also the protection of the good standing of the state before the ECtHR and other international institutions that monitor the implementation of international conventions on human rights and freedoms.

Ultimately, the Rules of Procedure of the Constitutional Court of North Macedonia (Article 51) would need to be modified, to harmonize certain provisions with the recommended constitutional amendment. In line with generally accepted usage, the term ‘constitutional complaint’ should be introduced in Article 53 of the Rules of Procedure. More precisely, the current term ‘request for protection of freedoms and rights’ should be replaced with ‘constitutional complaint.’

5. CONCLUSION

There is no doubt that the judiciary in North Macedonia, including the Constitutional Court, refers to the European Convention on Human Rights in a very small number of cases. The Constitutional Court applies standards developed by the ECtHR occasionally, selectively and mechanically in cases where these correspond to its own views. In fact, it uses the European Convention on Human Rights as a complementary argument when it needs to support its own argumentation during the decision-making process on certain constitutional matters. It does not authentically (genuinely) motivate or contribute actively to the enhancement and strengthening of constitutionally entrenched rights and freedoms of citizens, which are among the basic legal values of the constitutional order of the Republic of North Macedonia (the absence or lack of ‘judicial activism’ in the field of the protection of rights and freedoms of citizens). Generally, it can be said that the Constitutional Court seems hesitant, or applies in an inadequate manner the norms and principles of the ECHR as well as the case-law standards and practices of the Strasbourg Court, but quotes de-contextualized fragments in its reasoning in particular cases in practice.

The function of the Constitutional Court of North Macedonia, among other matters, is to legally protect constitutional rights is fundamentally inherent to the legitimacy of constitutional justice. In light of the existing circumstances for constitutional rights to be effectively legally protected, in the course of constitutional adjudication, they must be interpreted by the Constitutional Court of North Macedonia generously within the conceptual context of a constitutional textual framework as a holistic coherent normative whole. A teleological (purposive) or “prismatic” interpretive approach orients the constitutional judiciary towards considering the broader purposes underlying the constitution and also resists parochialism in constitutional practice.

By interpreting and applying the constitutional provisions on human rights and freedoms, in conformity with the ECHR the human rights doctrine of the Strasbourg Court, the Constitutional Court contributes to the development of the rule of law, democracy and constitutionalism and better protection of citizens’ rights in Northern Macedonia, and thus to preserving its reputation in the international community, and to the globalization of the constitutional law of Northern Macedonia. Northern Macedonia is thus meeting the challenges of the time by integrating, creatively evolving and transforming, as modern western democracies, from a sovereign civic state into a cooperative constitutional state.

The constitutional protection of subjective constitutional rights of individuals has in general developed in all states that have adopted the concept of a formal (written) and rigid constitution.



A constitutional complaint as a mechanism of accessory legal protection of basic rights and freedoms entrenched in the Constitution is complementary to regular judicial protection. Therefore the exceptional and subsidiary character of the constitutional complaint suggests that this legal institution can be used only for the protection of those rights of citizens which are explicitly guaranteed and protected by the Constitution.

Moreover, according to the current constitutional-normative regulation in the Republic of North Macedonia, one of the indispensable formal elements of a constitutional complaint is an explicit statement as to which constitutional right has been violated by the disputed legal act of public power.

As for the types of legal acts that can be the subject of a constitutional complaint the Constitutional Court of North Macedonia, with its Ruling No. 253/2009-0-0, states in its reasoning that it is competent to proceed on constitutional complaints of citizens who claim that with the final individual legal act a certain right or freedom had been infringed. It is irrelevant from which state body or court that act originates by whom that infringement was committed. Consequentially, according to the current constitutional-normative regulation in the Republic of North Macedonia one of the indispensable formal elements of a constitutional complaint is an explicit statement as to which constitutional right had been violated by the disputed legal act of public power.

Hitherto, the very restricted scope of constitutional rights and freedoms of citizens listed in Article 110, paragraph 1, item 3 of the Constitution of North Macedonia, together with the procedural rules established in Section IV of the 1992 Rules of Procedure of the Constitutional Court of North Macedonia, resulted in only a minor number of complaints about human rights violations. Therefore, it can be unequivocally stated that a constitutional complaint can be developed and advanced into an efficient *sui generis* and *ultima ratio* legal instrument for the constitutional-judicial protection of rights and freedoms of citizens via a constitutional reform. On the other hand, a constitutional complaint also serves as a national ‘filter’ in reducing the number of applications that arrive at the ECtHR in Strasbourg against the state.

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LINKS

- Link 1: ‘ECHR REFORM, Margin of Appreciation’ <<https://www.justiceinitiative.org/uploads/918a3997-3d40-4936-884b-bf8562b9512b/echr-reform-margin-of-appreciation.pdf>> accessed 10 September 2021.
- Link 2: ‘European Court of Human Rights: Questions & Answers’ <https://www.echr.coe.int/documents/questions_answers_eng.pdf> accessed 10 September 2021.
- Link 3: ‘European Court of Human Rights’ Europe’s Human Rights Watchdog <<https://www.europewatchdog.info/en/court/>> accessed 15 September 2021.

