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ACCESS TO THE CONSTITUTIONAL JUSTICE: THE PROPOSERS AS A KEY ELEMENT OF THE PROCEDURE FOR CONTROL OF THE CONSTITUTIONALITY OF ACTS

The basic elements of the procedure for control of the constitutionality of normative acts at the constitutional courts are: the entities, subjects (proposers) that can initiate the procedure and the manner of its initiation.

The issue of legal legitimacy directly determines the extent to which the judicial review of the laws and other acts will be exercised *de facto*.

Another indicator regarding the extent to which a certain constitutional court is going to be the final arbiter only with regard to the legal disputes is the pool of entities that may initiate the appropriate proceedings at the constitutional court.

For the procedure on control of the constitutionality of legal acts before the constitutional courts, it is of utmost importance to determine whether the initiators of the procedure are precisely defined entities with legal capacity arising from the constitution and constitutional or organic law or its initiators upon whose initiative the court will rule on the constitutionality of legal acts. Namely, as the initiators directly determine the answer to the question whether the constitutional court is "a true guardian of constitutionality", it follows that in circumstances where the court decides on the initiative, it has the discretionary authority to decide whether to raise or not the procedure for judicial review. Quite the contrary, if the holders of the right to initiate the procedure are precisely determined, the court is bound to a particular treatment of the presented proposal for judicial review of the disputed act.

That leaves the impression that the precise determination of the entities that can initiate the procedure for control of the constitutionality at the constitutional courts is not only a question of technical nature.

I. Proposers of the procedure for control of the constitutionality of the normative acts at the Constitutional court of Austria

The authorities that may initiate proceedings for judicial review before the constitutional courts are usually determined in the constitution or in the (constitutional) laws on constitutional courts. In Austria, this element of the procedure is a constitutional matter.

The nature of the proceedings at the Constitutional court determines the entities that may initiate the proceedings. Namely, in the case of abstract control of the constitutionality, proposers of the procedure may be the federal government and the governments of the federal units (Article 140). In addition, the federal government cannot challenge the constitutionality of the federal law and the federal governments units cannot challenge the constitutionality of the federal

unit laws. This constitutional solution suggests that the *federal government* can raise the issue of control of constitutionality of the federal units' acts. If the subjects of judicial review are federal acts, the proposers of the procedure for their judicial review may be the *governments of the federal units, at least 1/3 of the members of the National Council or 1/3 of the members of the Federal Council*. The Constitution also establishes the possibility to guarantee the right of at least 1/3 of the members of their legislatures to raise the question of the constitutionality of the federal act.

On the other hand, in case of a specific dispute, proposers of the procedure for control of the constitutionality of a particular act may be the Supreme court, the Administrative court or a competent court of appeal, but only if the subject of review is an act that they should implement. Stelzer commented that the Constitutional court decides on the constitutionality of acts when the procedure is initiated by any court (except a court of first instance), an independent administrative commission or the Independent Federal Asylum Tribunal.[1] In this way, these authorities raise the constitutionality issue as a prior issue. The Constitution provides the possibility for the Constitutional court to initiate *ex officio* the procedure for control of the constitutionality of an act that should be applied in a particular legal dispute.[2]

In terms of concrete control of constitutionality, the Constitutional court leaves the authorized nominators to decide which provision or part of the act they should implement is disputed and inconsistent with the Constitution. In case it is determined that the specific provision of the contested act is not relevant to the decision on the main issue, the Constitutional court reserves the right to dismiss the proposal. The specification of the disputed part of the legal act and the specification of the provision or section that is deemed unconstitutional is extremely important. This is because the constitution-maker bound the instrument of so-called judicial self-restraint to this question. In Article 140, the constitution-maker clearly held that the Constitutional court may abolish the unconstitutional law only to the extent and upon the grounds on basis of which it has been requested in the submitted proposal. This means that the proposal for judicial review may be rejected if it is found that the disputed provision is not unconstitutional or unlawful on the grounds specified in the proposal, although it may be unconstitutional or unlawful in any other respect. In that case, the Court is bound by the submitted proposal, but the disputed provision may be subject to judicial review of a new proposal by the authorized nominators. Perhaps this solution leaves the impression of being illogical or irrational as well as that it may result in increasing the Court's workload. However, taking into consideration which entities may appear as authorized initiators of the proceedings before the Court and adding the legal assumption that they know the law, it is expected that missing the ground of unconstitutionality of the provisions is an extremely rare case. Even if

[1] Stelzer Manfred, *An Introduction to Austrian Constitutional Law,* 2007, p. 75.

[2] See Article 140 paragraph 1 of the Constitution of the Federal Republic of Austria.

it occurs, it does not constitute an obstacle to re-initiate the procedure for the same provision or part of a normative act.

The Austrian constitutional judiciary does not recognize the opportunity for citizens, as individual private entities, primarily as parties in a particular dispute, to appear as proposers of the procedure for control of constitutionality of the legal act that should be implemented. The citizens can appear as instigators of the procedure for assessing the constitutionality, but ultimately the decision to initiate must come from a concrete proposal of any of the authorized proposers.

On the other hand, the citizens can instigate judicial review of law and any other act by filing an individual appeal to the Constitutional court. With this tool, citizens can challenge the constitutionality of laws and the constitutionality and legality of regulations, if these violate their rights and interests. The violation of the rights of citizens must be direct, in the sense that the contested provision should be applicable directly on the appellant, although a specific act (regulation) does not have to be adopted on its grounds.[3] Moreover, the Constitutional court will assess whether the challenged act directly violates the rights guaranteed to citizens or it just hurts their interests generally. This means that the Court has established the practice that the individual complaints filed by citizens for which it is competent to decide must cumulatively meet both conditions. Stelzer describes this through the examples of two decisions of the Constitutional court (VfSlg 12.829.1991 and VfSlg 10.571/1985). Namely, when the provision of a particular bylaw set a pedestrian zone on the path of the consumer to the store, the Court considered that it affected the economic position of the citizen, but without violation or hindrance to the exercise of his right. For these reasons, the appeal was dismissed as inadmissible. Similar is the case of the education law preventing the application of certain measures by teachers. The Court in the case appreciated that the legal provision did not prevent the right of teachers, but only affected the manner in which they conducted their work. In this case, the appeal was also dismissed.[4]

Finally, one may conclude that, although the system of constitutional judicial review in Austria does not allow direct initiation of the procedure for assessing constitutionality at the Constitutional court by the citizens as authorized initiators, the modeling of the system done in order to expand the circle of authorized initiators results in the creation of the instrument individual appeal. It seems that this instrument produces a double-effect - on one hand, it is filed in order to protect the constitutional rights of the citizens and, on the other hand, indirectly, it initiates the procedure for judicial review of laws at the Constitutional court. Essentially, it means that while attempting to protect their guaranteed rights, the citizens indirectly participate in the maintaining of the monolithic

[3]More in: Faber Ronald, *The Austrian Constitutional Court - An Overview,* 2008, p 51; *Vienna Journal for International Constitutional Law, Volume 1* at: www.icl-journal.com

[4]Stelzer Manfred, *An introduction to Austrian Constitutional Law*, 2007, p. 76.

legal system and in the protection of constitutionality and legality of the same.

II. Proposers of the procedure for control of the constitutionality of normative acts at the Constitutional court of Italy

Italy's Constitutional court is competent to assess the constitutionality of legal acts only if the procedure is initiated by precisely defined entities. The issue of entities that may submit proposal to initiate the procedure for judicial review is *materia legis* and it is governed by constitutional laws - the 1948 Law on the Constitutional Court and the Law on the Constitutional Court of 1953.

In the proceedings on *abstract control of constitutionality*, the procedure for assessing the constitutionality of legal acts may be raised by the executive organs of the state, regions and provinces, i.e. the public legal entities with executive function. The prime minister can initiate proceedings before the Constitutional court to evaluate the laws of the regions and provinces as well as federal laws.[5] On the other hand, regions and provinces may initiate proceedings at the Constitutional court for judicial review of the state law, the law of another region and provincial act. Finally, pursuant to the provisions of Articles 31 and 32 of the Law on the Constitutional Court of 1953, two provinces may initiate a procedure for judicial review of a state law or the law of a region.[6]

As individuals, the citizens cannot initiate procedure for assessing the constitutionality of laws and acts with the effect of a law at the Constitutional court. They are not marked as entities-subjects that may submit a proposal to initiate proceedings at the Constitutional court. Although they are not holders of the right to initiate the procedure, the citizens may initiate a procedure for judicial review of a law at the Constitutional court, only in specific litigation at the competent court. The mentioned possibility does not mean that, if at any of the regular courts the citizens propose or initiate a procedure for judicial review by the Constitutional court, the application will

[5]The question of constitutionality of the laws of regions can be raised at the Constitutional court by the Prime Minister within 15 days from the date of its notification by the President of the region that the law has been adopted by the Council of the region for the second time. Article 31 of the Constitutional Court Act no 87 from 1953 at: http://www.codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/ita?fn=document-frame.htm$f=templates$3.0

[6]Reviewing of the constitutionality of acts of regions, pursuant to the provisions on the Constitutional court from 1948, may be initiated by the authorities of other regions. The question can be set by submitting a proposal to the Constitutional court by the President of the regional government of any other region, with mandatory reporting of the President of the region that brought the unconstitutional act and to the Prime Minister within 60 days from the date of publication of the law. Article 33, Law on the Constitutional Court no 87 from 1953 at: http://www.codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/ita?fn=document-frame.htm$f=templates$3.0

automatically result in the initiation of the procedure. The competent court from the judicial system before which the particular litigation is pending retains the right to decide whether to submit a proposal for judicial review at the Constitutional court upon the initiative of the actual parties and it will deem the issue of constitutionality as a prior issue.

There is an increased criticism toward the solutions of the Constitutional Law that regulates the issue of the subjects that may initiate the procedure in a minimalistic manner.

Finally, the contemporary model of control of the constitutionality by the Constitutional court of Italy does not recognize the citizens among the holders of the right to initiate these proceedings. One may conclude that the minimalistic legal provisions that regulate this issue in a very limited fashion, as well as the so-called *gray areas* that the Constitution, left could be removed successfully through the introduction of an instrument for individual constitutional appeal in any of the variations in which it is encountered.

In Italy, apart from the abstract control of the constitutionality, there is a concrete control of the constitutionality. A procedure of judicial review by the Constitutional court may be initiated upon a particular dispute in administrative, criminal or civil procedure pursued at the court of the judicial system that needs to apply the contested law. This specific, indirect or incidental procedure for judicial review in Italy is a *conditio sine qua non* for the outcome of the proceedings before the regular court. The Act of the Constitutional court regulates the right of the courts from the judiciary system to file a formal proposal to the Constitutional court to review the constitutionality of the act that should be applied upon its own initiative, upon the initiative of the parties in the dispute or upon the initiative of the State attorney. Moreover, the proposal for review of constitutionality must specify the exact legal provisions that the question of assessing the constitutionality concerns and the constitutional provisions that the disputed legal norms contradict.

This landmark of the Italian model of judicial review sets it apart from the rest. Namely, *Groppi* points out that the system of control of constitutionality in Italy differs from pure Austrian (Kelsen's) model of judicial review by the constitutional court, characterized by centralized and abstract review of the constitutionality of acts. However, it also sets it apart from the diffuse specific model for review of constitutionality that is specific for the USA. Thus, he underlines that the implementation of the Italian model of control of the constitutionality does not preserve the purity of the Kelsen's model and it involves elements of diffuse and decentralized judicial review of constitutionality. This derives from two elements: 1) the ability of judges to decide discretely whether to initiate a procedure for judicial review of the constitutionality at the Constitutional court (concrete constitutionality control) and 2) the

jurisdiction of the regular judiciary to assess the legality and constitutionality of sub-legal acts.[7]

On the same grounds is the standpoint of *Gianluca Gentili* who emphasizes that the model of control of constitutionality of acts had no precedence in Italy at the time of its establishment. Thus, it can be considered a compromise between centralized and decentralized models of review of constitutionality. Namely, the acceptance of centralized control - Kelsen's model of review of constitutionality is mixed with some elements of the decentralized models of judicial review of constitutionality, such as the opportunity that the judges of courts of the judicial system raise questions about the constitutionality of the norms to be applied in a concrete case.[8]

Finally, the Italian academic thought provides a variety of solutions to address the mechanisms for initiating the procedure for judicial review of the constitutionality in Italy as a feature of the system. *Elisabetta Lamarque* states that this model "ideologically exists in the space between the European centralized model and the diffuse American model".[9]

III. Proposers of the procedure for control of constitutionality of normative acts at the Constitutional court of Spain

The issue of the entities that hold the right to initiate the procedure for control of constitutionality at the Constitutional court in Spain is *materia constitutionis* and it is regulated in Article 162, paragraph 1 of the Constitution. This constitutional provision specifies that the entities authorized to initiate the procedure for judicial review at the Constitutional court are: the Prime Minister, the Ombudsman, 50 members of Congress, 50 senators, the executive authorities of the autonomous communities and their legislatures.[10] However, all issues related to the initiation of the procedure for review of constitutionality

[7]See: Tania Groppi, *The Italian Constitutional Court: Towards a Multilevel System of Constitutional Review,* 2010. p. 104 at: *www.astrid-online.it/.../**Italy-constitutional-Court-**JCL_T_**Groppi**.pdf*

[8]Gentili Gianluca, 'A Comparison of European Systems of Direct Access to Constitutional Judges: Exploring Advantages for the Italian Constitutional Court', *Italian Journal of Public Law,* Volume 4, 2012, p. 186-189 at: *www.ijpl.**eu**/assets/files/pdf/2012_volume_1/7.**Gentili**.pdf*

[9]The Italian model of control of constitutionality ensures the existence of a specialized body with the authority to review the constitutionality of laws (Constitutional court) and it prevents the courts from the regular court system to do the same. However, the *differentia specifica* of the Italian model of control of constitutionality is the possibility of so-called *preliminary review* of the constitutionality of laws that the regular courts should apply in specific cases and for which they may become initiators of the procedure at the Court. See: Lamarque Elisabetta, 'Interpreting Statutes in Conformity with the Constitution: The Role of the Constitutional Court and Ordinary Judges', *Italian Journal of Public Law,* Volume 1, No 1, 2010. p. 96 at: http://www.ijpl.eu/archive/2010/issues-11/interpreting-statutes-in-conformity-with-the-constitution-the-role-of-the-constitutional-court-and-ordinary-judges

[10] Article 162 paragraph 1 of the Constitution of Spain.

at the Constitutional court by the authorized nominators are regulated in detail by the Organic Law on the Constitutional court.

The Organic Law on the Constitutional Court specifies that, if the subject of a*bstract review is the constitutionality* of: the charters of the autonomous communities, state laws (organic or common), international treaties, laws and regulations with the effect of law of the autonomous communities or the rules of the legislative chambers of the Parliament (Cortes generales), the procedure for judicial review of the constitutionality at the Constitutional court is realized upon a proposal of *the Prime Minister, the Ombudsman, 50 Congress MPs and 50 senators.*[11]

On the other hand, if subject of the judicial review of constitutionality is a law or an act with the effect of law that might affect the status of the autonomous communities, passed by the National parliament, the procedure for judicial review may be initiated by *the executive authorities of the autonomous communities and their legislatures.*[12]

The experience has shown that, usually, the initiators of the procedure for control of the constitutionality are 50 Congress MP's or 50 senators that belong to the parliamentary opposition. *Comella* said that: …"the reason for this phenomenon should be sought in the disagreement of the opposition parties with the adopted policies translated into law, making use of every opportunity, when they believe that the adopted acts are contrary to the Constitution, to initiate proceedings for review at the Constitutional Court".[13] On the other hand, when regional executive authorities or legislative bodies of the autonomous communities submit a proposal for review of constitutionality, it usually refers to the organization of the state. However, if the Constitutional court finds violation of their status, regardless of the source of such injury, the effect of the court decision is *erga omnes* and it applies to all branches of state government.

The review of constitutionality of a specific act at the Constitutional court may be initiated by *the courts of the judicial system*. The system of judicial review in Spain provides two basic ways of bringing proceedings at the Constitutional court. Thus, the abstract review of constitutionality can be initiated at the request of any of the constitutionally defined authorized bodies, through a proposal for review of constitutionality *(recurso de inconsttitutionalidad).* On the other hand, the Constitutional court may exercise specific review of constitutionality through constitutional question - the so-called question of unconstitutionality *(cuestion de inconsttitutionalidad)* which can be initiated by the courts of the judicial system. Namely, if in the course of the implementation of particular law in particular litigation, the courts of the regular judiciary confront provisions whose constitutionality is questionable, they must raise the question of constitutionality of the act at the Constitutional court. Given that the Constitutional court has monopoly

[11] Article 32 paragraph 1 of the Organic Law on the Constitutional court.
[12] Article 32 paragraph 2 of the Organic Law on the Constitutional court.
[13] Ferreres Comella Victor, 'The Spanish Constitutional Court: Time for Reforms', *Journal of Comparative Law,* Volume 3, Issue 2, p. 26 at: www.astrid-online.it/Giustizia-1/Studi--ric/JCL3-**2**-final .pdf

in the review of the constitutionality of laws, there is no possibility for the courts of the judicial system, even in the case of identical legal norms for which the Constitutional court has already ruled, to deem the disputed provisions unconstitutional, until the Constitutional court decides on the matter. The court will be able to decide the particular dispute only after the decision of the Constitutional court on the constitutionality of the disputed legal provisions. The inspiration for the mentioned solution in the system of judicial review of constitutionality in Spain is the so-called incidental control of constitutionality of the Italian model. The main difference, however, lies in the legal effect of the decisions of the constitutional courts, because the decision of the Constitutional court of Spain has an effect *erga omnes*.

The Spanish Constitution does not recognize *the citizens* as authorized entities that may initiate the procedure for judicial review of the constitutionality of legal acts at the Constitutional court. The provisions of the Constitution and the Organic Law bind the aforementioned initiators with abstract and concrete review of constitutionality through the following instruments: the proposal for review of constitutionality (*recurso de inconsttitutionalidad*) and the question of unconstitutionality (*cuestion de inconsttitutionalidad*). However, the constitutional appeal or instrument (*recurso de amparo constitutional*) which may be initiated by the citizens as individuals who have so-called legitimate interest, may initiate the procedure for judicial review of constitutionality of the law. Namely, the constitutional appeal in Spain may be a starting ground for declaring the unconstitutionality of the law. Thus, the provisions of the Organic Law related to the proceedings before the Constitutional court provide that, in circumstances where the houses of the Court accept the constitutional appeal, the law that was implemented when the act which created the violation was passed, may be subject to judicial review of the constitutionality at a plenum session. In addition, the court may further decide on its unconstitutionality with *erga omnes* effect. This means that, through *recurso de amparo,* the citizens may initiate the procedure, but they may not be authorized proposers. The Constitutional court plenum decides on the initiation of the procedure, upon initiative by the house of the Constitutional court that decided in the specific procedure about the protection of the citizen's rights.

Apart from the above-mentioned case, the citizens may initiate the procedure for judicial review of the constitutionality indirectly, when they appear as parties in a particular litigation. Namely, upon their initiative, the court may decide to initiate a procedure for specific review of constitutionality at the Constitutional court, through the question of unconstitutionality.

Finally, Article 95 paragraph 2 of the Spanish Constitution provides that, if the subject of review of constitutionality at the Constitutional court is an international agreement, *both legislative chambers and the government* may file a proposal for judicial review of constitutionality. This constitutional provision provides that, after the signing of the international agreement and before its ratification, the said authorized bodies may raise questions on the review of constitutionality. In this way, the constitutional solution introduces preventive - *a priori* review of constitutionality in Spain, which also

represents the only form of preventive review recognized by the Spanish model.

The decision of the Constitutional court regarding the implementation of the preventive review of constitutionality is binding. In addition, in case it is determined that the international agreement does not comply with the Constitution, it is necessary to begin a process of revision of the Constitution in order to ratify it.[14] However, it is important to emphasize that preventive review of constitutionality does not replace the "conventional" form of repressive judicial review of constitutionality when subject of evaluation are international agreements. The preventive mechanism is complementary and it does not substitute the judicial review of constitutionality, established in the proposal of one of the authorized nominators.

Finally, according to the solution adopted in the Spanish model of judicial review of constitutionality, the question of reviewing the constitutionality of acts is regulated in a sufficiently wide manner to provide a system of effective constitutional judicial review. It seems that the "founding fathers" of the Spanish Constitution avoided on time the mistake of the Italian legislator, which denies this capacity to the citizens. The impression remains that the system is set up in a way that provides access to a relatively wide range of authorized bodies in terms of abstract review of constitutionality. On the other hand, the protection of constitutionality seems to be guaranteed further by: 1) the possibility of specific control of constitutionality rose by the question of unconstitutionality by the ordinary courts and 2) the instrument of constitutional appeal (*recurso de amparo constitutional*) that may ultimately lead to initiating proceedings for judicial review of constitutionality by the Constitutional court.

IV. Proposers of the procedure for control of the constitutionality of normative acts at the Constitutional court of the Republic of Macedonia

The Constitutional judiciary in the Republic of Macedonia has nearly a half a century tradition. The first Constitutional court was established in 1963 and even though it was established in conditions of a parliamentary system of organization of powers, it represented the most important constitutional novelty and a true constitutional achievement.

The Constitution of the Republic of Macedonia from 1991 preserved the model of control of constitutionality of laws by the

[14]The procedure determined in the constitutional Article 95 was first realized in 1992 (Declaration on the constitutionality 1/1992) during the preventive control of constitutionality of the Maastricht Treaty. In the first case, the Constitutional court established the need for change in the Constitution of Spain if, in accordance with the provisions of the Maastricht Treaty, the right of vote of foreign nationals should be enabled. Accordingly, the Constitution was amended and Article 13 extended the political rights to foreigners. In the second case, the Constitutional court found that no inconsistency exists between the idea of the Spanish Constitution as the supreme law of the land and the provision of TCE. This ensured that the EU law has primacy in the application.

Constitutional court. The creation of the Macedonian constitution-maker, which established the system of organization of powers in accordance to the principle of separation of powers, seems to be *conditio sine qua non* in the ensuring of the independent position of the Constitutional court of the Republic of Macedonia. The position of the Constitutional court of the Republic of Macedonia is determined with the Constitution of the Republic of Macedonia from 1991. In accordance to it, the Constitutional court represents an authority outside the regular judiciary, which has the function to protect the constitutionality and legality. Even though the Court was conceived as an authority facilitating the transformation from a "dying" state into a legal state and as an authority protecting the supremacy of the Constitution, the constitutional norms leave an impression that the Macedonian constitution-maker has not fully expressed himself. Namely, the matter of the Constitutional court of the Republic of Macedonia is *materia constitutionalis*, but not *materia legis*. According to the comparative experience, presented in the literature on the constitutional courts, the principal questions bound to the composition and jurisdiction of this authority are regulated in the constitutions and further elaborated in law. On the contrary, however, the Macedonian constitution-maker has excluded this possibility. Today, Article 113 of the Constitution provides that the mode of operation and procedures at the Court are determined with an act by the Court (Rules of procedure). This provision provides an explicit inability to regulate the matter with law. The legal consequence of this constitutional provision is that it leaves room only for the possibility that such an exceptionally important matter is regulated only by the Rules of procedure. In this context, Treneska underlined that …"the lack of constitutional grounds to pass Law on the Constitutional court permits that the constitutional judges themselves decide on many important questions concerning their own position, which is unacceptable, since it may lead to infringement of the principle of check and balance".[15]

The thesis that the constitutional norms on the Constitutional court are too modest may be supported with the fact that the constitution-maker left to the Rules of procedure to regulate the issue of initiation of the procedure for control of constitutionality of laws. Namely, it must be underlined that the issues concerning the right of initiative to challenge the constitutionality of acts are extremely important. The authorities who initiate the procedure at the constitutional courts are always precisely determined in the constitution or the act on the constitutional court and they depend on the type of procedure that is supposed to be conducted by the court. In the comparative constitutional law, the mechanism of judicial review at the constitutional courts activates upon the proposal of the specific state organs, most commonly by the legislative, the executive, the ombudsman or upon a proposal by the regular or the constitutional courts. The theoretical rationale for this solution should always be found in the intention that the constitutional court is created as the final arbiter solely in legal disputes. On the other hand, the inclusion

[15] Treneska-Deskoska Renata, *Ustavniot Sud na Republika Makedonija – Dilemi i Perspektivi,* Skopje, 2010, p. 28.

of a constitutional norm that authorizes the citizens to be initiators of the procedure for judicial review hides the danger that, as participants in a specific political process, they transform the court in an organ for political decision making, which again actualizes the possibility of judicial activism. In the context of the issue of activation of the mechanism of judicial review, it is extremely important to determine whether the procedure that is to be followed is part of abstract or concrete review. In case of concrete review, the court may be the only initiator of the procedure for judicial review aiming to solve a previous issue about the conformity of the legal norm with the Constitution. On the other hand, in case of abstract review, the citizens may also be initiators of this procedure, although it is the Court that begins the procedure on control of constitutionality of laws.

In the Constitution of the Republic of Macedonia from 1991, there is no provision determining who may be an authorized initiator of the procedure for review. Such an important issue is left to be regulated with the Rules of procedure of the Constitutional court itself. Article 12 of the Rules of procedure of the Constitutional court of the Republic of Macedonia provides that everyone may file an initiative for the initiation of the procedure for judicial review of the laws and review of other bylaws. This solution for the beginning of the mechanism of judicial review places the Court in a position to decide independently whether to initiate the appropriate procedure.

Namely, if the Constitution or a law would regulate which subject may initiate the procedure, the Court would be bound to specific action upon the filed request from the authorized initiators. The landscape of the control of constitutionality of acts by the Constitutional court of the Republic of Macedonia shows a different picture. The lack of specified subjects that can trigger the procedure for control of constitutionality leaves the Court with discretionary right to decide whether it will start the procedure or not. As the scholars warn, the nonrealistic regulation of the subjects having the right to trigger the procedure can make the whole institute sterile or it can leave the door opened for practicing the activist mechanisms by the Court. According to the case study of the Republic of Macedonia, it seems that this provision is the most frequently used in situations when the Court does not want to decide about the constitutionality of some ‘’controversial’’ act. In the context of the previous, the practice of the Constitutional court reveals contradictory decisions on the question whether it does or does not have the authority to decide about the constitutionality of international treaties. In all cases where the initiative for control of constitutionality of international treaties was rejected, the Constitutional court decided that the international treaties could not be a subject of control of constitutionality. In 1996 (u.br.230/1996), 2000 (U.br. 178/2000) and 2005 (U.br.150/05), the Court ruled that it does not have the authority to control the constitutionality of the international treaties. In 2002 (U.br.140/2001), the Constitutional court started the procedure for control of constitutionality of an act concerning the ratification of an international treaty. For this reason, we may conclude that the practice of the Constitutional court of the Republic of Macedonia leaves the impression of ‘’wild mood swings”. As Treneska warned, “the changes of the positions in the deciding makes the Constitutional court

a manipulator of the Constitution, rather than a guardian of the constitutional order".[16] The right to reject the initiative is also used frequently when other acts are placed as subjects of the procedure and the initiator claims that these acts oppose the Constitution, as in U.br.82/2012 from June 27, 2012[17] or U.br. 158/2011 from October 31, 2012.[18]

Even though this cannot be determined from its practice, in the case of the Republic of Macedonia, the Court has a strong mechanism for political maneuvering, precisely because it is the Court itself that brings the final decision on the initiation of the procedure on judicial review initiated by any citizen.

Such normative positioning of the Constitutional court in the Republic of Macedonia leaves the impression that this authority is one of the most powerful in the system of organization of power. Still, even though the practice of this authority to decide upon numerous constitutional issues, especially from 1991 onwards, cannot be neglected, the facts on the influence of this authority in the system show a completely different picture. Namely, the practice of the Constitutional court leaves the impression that it restrains from self-initiated procedures. The reason for this is its need to protect itself from the qualification of second legislator. Therefore, it is right to determine that such an unfortunate constitutional solution leaves room for the greatest fear in the modern constitutionalism in the Republic of Macedonia – showing that in the conditions of new separation of powers, the Court has transformed into a lawmaker or a constitution-maker.

It seems that in the case of the Republic of Macedonia, finding a solution to the so-called problem of counter-majoritarian difficulty neither was considered, nor its appearance was presumed when the constitutional norms were created. A more detailed analysis even opens the dilemma whether several modest provisions of the Constitution should secure the so-called passive virtue of the Court, addressed by Bickel, or they should incite Court's particular commitment toward the careful and strategic decision making which shall influence its position in the system.

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[16]Renata Treneska-Deskoska, 'Kontrola na ustavnosta i zakonitosta: osnova i predmet', *Godisnik na Pravniot fakultet Justinijan Prvi vo chest na prof. d-r Strezovski,* Skopje, 2006, p. 813.

[17]In the Decision U br. 82/2012 from July 27, 2012, the Constitutional Court of the Republic of Macedonia concluded that the nature of the Regulation as an act defining the relationship among the staff from the Faculty of Dentistry shows that it is a concrete, internal act that has legal effect only for the subjects of the faculty and does not apply to any other subject. It cannot be subject of the control of constitutionality. Given that the challenged regulation is an internal act and it is not an act eligible for constitutional judicial analysis or assessment implies that the same may not have the character of a provision that regulates relations among an unlimited number of subjects.

[18]In the decision U.br.158/2011, the Constitutional court of the Republic of Macedonia considered that the content of the actual authentic interpretation of the Amnesty Act does not contain any clarification regarding how to understand the content of Article 1 and how should it be applied. The Court found that it is eligible for constitutional judicial assessment.

Conclusion

The basic elements of the procedure for control of the constitutionality of normative acts at the constitutional courts are: the entities, subjects (proposers) that can initiate the procedure and the manner of its initiation.

The issue of legal legitimacy directly determines the extent to which the judicial review of laws and other acts is *de facto* exercised.

In the comparative constitutional law the mechanism of constitutional review at the constitutional courts activates upon proposal by specific state organs, most commonly by the legislative, the executive, the ombudsman or upon the proposal by the regular or the constitutional courts. The theoretical rationale for the said solutions should always be found in the intention that the constitutional court is created as the final arbiter solely in legal disputes. On the other hand, the inclusion of a constitutional norm authorizing the citizens to be initiators of the procedure for constitutional review hides the danger for them as participants in a specific political process, to transform the court into an organ for political decision making, which again actualizes the possibility of judicial activism.

Namely, if the constitution or a law would regulate which subject may initiate the procedure, the court would be bound to specific action upon the filed request from the authorized initiators. The lack of specified subjects that can trigger the procedure of control of constitutionality leaves the court with discretionary right to decide whether it will start the procedure. As the scholars warn, the nonrealistic regulation of the subjects having the right to trigger the procedure can make the whole institute sterile or it can leave the door opened for practicing the activist mechanisms by the court.

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