CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

NATIONAL REPORT

XIXth Congress of the Conference of European Constitutional Courts

Forms and Limits of Judicial Deference: The Case of Constitutional Courts

I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

The term "judicial deference" has not been closely defined in the practice of the Constitutional Court of the Republic of North Macedonia, nor the constitutional and legal theory, as well as in the academic works of the constitutional and legal specialists in the Republic of North Macedonia. As the starting point for the preparation of the answers to this questionnaire served the definition provided in the introduction of this questionnaire, which states that judicial deference is a juridical tool invented by judges to uphold the separation of powers and to refrain from intervening in matters that are perceived to be beyond their expertise or legitimacy to decide, which is especially applicable in cases involving human rights.

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

The most frequent areas where the Constitutional Court exercises judicial deference are those in matters of foreign policy and national security, as well as criminal law, including amnesty.

Foreign policy is thought to belong exclusively to the executive power and cannot be a subject under control by the Constitutional Court. One of the earliest decisions of the Constitutional Court in which such an attitude was set out is **Resolution U.No.111/1993** from November 10, 1993, where the Constitutional Court rejected an initiative for a review of the constitutionality and legality of the membership of the Republic of Macedonia in the UN under the temporary reference "*former Yugoslav Republic of Macedonia*". The fact that there is no regulation or other general act expressing approval for the admission of the Republic of Macedonia to the UN under a temporary and provisional name *"former Republic of Macedonia"*, led the Court to the conclusion that there are no procedural presumptions for initiating constitutional proceeding, and that: *"particular political and diplomatic actions and activities of the Government of the Republic of Macedonia, which were carried out throughout the process of the international recognition of the Republic of Macedonia, in capacity of executive power in the area of international relations, as negotiations and planning for a final and competent decision by the competent state body, are not and cannot be subject to a constitutional review",* and that *"for potential negative outcomes associated with the admission of Republic of Macedonia to the UN under the terms outlined in the draft-resolution of the Security Council, it addresses the issue of political accountability, and in accordance to Article 110 of the Constitution, the Court has no jurisdiction to make decisions."*

The Court took a similar stance with regard to the recognition of foreign states and governments, which is solely within the competence of the Government of the Republic of North Macedonia as per Article 91 Indent 8 of the Constitution. The Court cited the doctrine of a political issue once again, in the case **U.No.140/1999** from 14.06.2000, where the Court rejected the initiative to initiate a proceeding for a constitutional review of the Decision on the establishment of diplomatic relations between the Republic of Macedonia and the Republic of China ("Official Gazette of RM" No. 7/99). The petitioner believed that this Decision violated the Constitution because it was made by a Government that did not have the authority to enter into international agreements and that it was in violation of the obligations of the state that had previously established diplomatic relations with the People's Republic of China, committing to consider Taiwan as an integral part of the People's Republic of China. The Court noted that: "*In accordance with Article 91 Indents 8 and 9 of the Constitution, it is undeniable that the Government of the Republic of Macedonia has direct constitutional competence to recognize states and governments and to establish diplomatic and consular relations with foreign states.*" According to the assessment of the Court, *the acts used by the Government to exercise these powers have a distinct character as actions used to carry out a specific international policy at a specific period and have political underground, regardless of their form. According to Article 2 of the Vienna Convention on Diplomatic Relations, the consequences of those acts on the international relations of the state unquestionably have a legal character, but they do not constitute a part of the internal legal order, either as sources of law (regulations) or as acts whose content is limited by law, except in terms of the competence for their adoption.* The contested decision... according to the Court, obviously falls inside the Government's defined political power under Article 91, Indents 8 and 9 of the Constitution, and it represents „*a declaration of a state's political intent, or that of its authorised bodies, to establish diplomatic relations with a foreign state, without becoming a regulation of its own internal legal system. As a result, only mechanisms of parliamentary democracy of political control can be used to control that act.* "

In another case, the Constitutional Court rejected to review a constitutionality on the Law on the Ratification of the Agreement between the States Parties to the North Atlantic Treaty and other States participating in the Partnership for Peace on the Status of their Forces and the Additional Protocol, on the grounds that the Constitution does not expressly grant the Constitutional Court the competence to decide whether international agreements are constitutional (**Resolution U.No.178/200** from 31 January 2001).

A few years later, a different petitioner, citing the Resolution U.No.178/2000 that was previously mentioned, demanded the Constitutional Court to review the constitutionality of the Basic Agreement between the Republic of Macedonia and NATO on the operation of NATO missions in Macedonia from 24 December 1998 and the Agreement for a NATO headquarters based in Skopje from 11 May 1999. The petitioner was of the opinion that the Constitutional Court could not invoke the doctrine of a political issue and decline jurisdiction over the contested

agreements because they had the nature of regulations, with which the Government interfered with the legislative activities of the Assembly and violated the Constitution.

Once again, the Constitutional Court declared that it "*absolutely does not have competence to repeal or annul international treaties as acts of international law*" adding that "*the competence of the Constitutional Court to repeal or annul an act can only be established with respect to the instruments for the entry of a particular agreement into the Republic of Macedonia's legal system, such as the law on ratification of such an agreement*" and that "*by annulling a ratification law or other unlawful instrument, the Constitutional Court can prevent an international agreement from becoming a part of domestic law, but it cannot interfere with the international agreement as such.*"

According to the Court, the fact that those agreements entered into force in the international legal system as soon as they were signed, does not affect their concurrent incorporation and entry into force in the domestic legal system. The Court did not contest the fact that the contested agreements were not ratified or published, but it determined that what is requested by the initiative is outside of its jurisdiction, because the Court does not have the authority to make conclusive and declarative decisions about whether or not an international agreement is a part of the domestic legal system (**Resolution U.No.77/2009** from 21 April 2010).

With the Resolution **U.No.250/2009** from 23 December 2009, the Constitutional Court did not initiate a review of the constitutionality of the Law on ratification of the Agreement on the Physical Demarcation of the Border between the Republic of Macedonia and the Republic of Kosovo ("Official Gazette of the Republic of Macedonia" no. 127/2009"). The petitioner of the initiative (a political party) believed that the agreement altered the borders of the Republic of North Macedonia, and insisted that it should have been approved by a two-thirds majority rather than a simple majority. According to the court, "*The Constitutional Court does not have the constitutional competence to review the Agreement on the physical demarcation of the border between the Republic of Macedonia and the Republic of Kosovo, whose agreement with the Constitution was evaluated by the Assembly of the Republic of Macedonia in the ratification procedure, and in which the contested law is properly adopted in accordance with Point 1 of Amendment X of the Constitution of the Republic of Macedonia*".

The cases **U.No.9/2021** and **U.No.25/2021** (Resolution from 20.04.2023) from the most recent constitutional case law could be regarded as an example of judicial deference in the area relating to energy and the exploitation of natural resources. The Constitutional Court rejected the initiatives to initiate a proceeding for the review of the Law on the Resolution of the Dispute between the Government of the Republic of North Macedonia and Makpetrol AD Skopje, adopted in 2020, on the grounds that the legal disputes between the Government and a private company that performs the activity of supplying natural gas in connection with the ownership of the gas pipeline system of the Republic. The petitioners of the initiatives claimed that this law violates the principle of the rule of law and the principle of separation of powers because the

Parliament has taken under its jurisdiction an issue that belongs to legal obligations and that should be resolved by a judicial or extrajudicial settlement or a judgment. The Constitutional Court did not accept the allegations in the initiatives and rejected them. The fact that the disagreements were settled through an agreement and the proceedings in connection with the ownership dispute for the gas pipeline system were terminated due to the law, despite the fact that the constitutional judges did not contest its separate and specific nature, was a key factor in the decision-making process. This allowed the state to maintain ownership of the natural gas transmission system and ensure further development of gasification in the Republic of North Macedonia. The Constitutional Court did not conduct a substantive legal review and rejected the initiatives due to the conclusion that the goals of the law have been met and its application has been exhausted.

3. **Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?**

There are no predetermined criteria that dictate when and how the Court should refrain (exercise self-restraint); rather, it depends on the particulars of the case at hand, especially the subject matter of the issue that is brought before the Court.

4. **Are there situations when your Court deferred because it had no institutional competence or expertise?**

The Constitutional Court of the Republic of North Macedonia assesses and analyses the contested laws and regulations in their entirety, that is, in both a substantive and formal sense, when reviewing their constitutionality and legality. The Court reviews both the substance, as well as the adoption process. However, when it comes to urban planning, this rule is occasionally deviated. The Constitutional Court of the Republic of North Macedonia is one of the few constitutional courts in the region and, more broadly, in Europe that decides on the constitutionality and legality of urban planning. The jurisdiction of the Constitutional Court in relation to these acts derives from the constitutional provision of Article 110 Indent 2, which states that in addition to deciding whether or not laws passed by the Assembly are constitutional, the Constitutional Court also has the authority to decide on whether or not other regulations are in compliance with both the Constitution and the laws. The regulations approved by the bodies of the local self-government units, such as urban plans and planning, are also included in the category of other regulations. The Constitutional Court developed a position that the urban plans adopted by the councils of the local self-government units represent general acts with a

normative character, i.e., regulate relationships in the field of urban planning generally, and that as regulations, they are subject to constitutional-judicial control. In terms of the scope of control over urban planning, the predominant[1] view in earlier constitutional case law was that the jurisdiction of the Constitutional Court only pertains to the process of adopting an urban planning, not its content, and that its jurisdiction over urban plans is restricted. However, through the control of the legality and constitutionality of the legal aspects of the procedure of their adoption, the Constitutional Court provides effective protection of the constitutional principle - the arrangement and humanization of space and the protection and improvement of the environment and nature, which according to Article 8 Paragraph 1 Indent are fundamental values of the constitutional order. As a result, in line with this stance of the Constitutional Court, when the party with the initiative submitted to the Constitutional Court requested that the Constitutional Court review the planning-urban decisions in the urban planning (for example, the type and purpose of buildings, the number of floors of buildings, planned infrastructure, etc.), the Constitutional Court rejected the initiatives as being non-competent on the grounds that the issues presented by the initiative went beyond its jurisdiction: "*From the established case law of the Constitutional Court of the Republic of Macedonia, and in relation to by-laws in the field of spatial and urban planning (urban plans, programs for the installation of urban equipment, etc.), it follows that the Constitutional Court is competent to review the procedure for their adoption, but not their content, which as a professional-technical matter falls under the competence of the Ministry of Transport and Communications in the phase of giving consent to these by-laws*" (**Resolution U.No.58/2017** from 13.12.2017, similarly in **Resolution U.No.6/2012** from 7 March, 2012).

Similar reasoning applies to the Rulebook on Standards for Urban Planning, which often appears as the subject in initiatives submitted to the Constitutional Court. In relation to this act, the Court took the position that: "*The Rulebook on Standards and Norms for Urban Planning is a technical norm that is based on certain scientific and expert opinions and experiences in the field of urban planning and which is adopted by the competent minister following a legally implemented procedure*" (**Resolution U.No.12/2013** from 3 April 2013). Consequently, the Court refrains from reviewing this act and the request for its control "*it cannot serve as a basis for assessing the constitutionality and legality of this by-law because the references are to professional rather than legal matters, and this is made more apparent by the fact that they represent the exercise of legally recognized powers*" (**Resolution U.No. 19/2008** from 18 June 2008).

[1] In the recent constitutional case law, the Court has abandoned this position so that it can review the content of urban planning (**Resolution U.No.23/2022** from 5 April 2023 by which the Constitutional Court determined that the Detailed Urban Planning is not in accordance with the General Urban Planning because the Detailed Urban Planning provided for the construction of buildings with other purposes than those planned by the General Urban Planning for the City of Skopje); Similarly with Resolution U.No.**81/2022 from 12 July 2023**).

5. **Are there cases where your Court deferred because there was a risk of judicial error?**

As an answer to this question, it is possible to cite those few instances in which the Constitutional Court, after expressing doubts about the constitutionality of law or regulation and initiating a procedure for a review, does not continue to the second stage of the procedure, which includes annulment or repeal of the law or regulation, but instead stops the procedure.

This possibility is foreseen in Article 47 of the Rules of the Procedure of the Constitutional Court, which states that the Court will halt the proceeding if it is found that the inception of the procedure was founded on an incorrect factual scenario; or if the reasons for questioning the constitutionality and legality vanish when the factual and legal circumstances of the public hearing are established. (This includes instances where the author of the act, in response to the Court's decision to initiate a procedure for review of the constitutionality of a law (or other regulation), will point to specific facts or circumstances that the Court did not take into consideration when making the decision and which cast a different light on the matter, that is, which are of sufficient influence to cause the grounds for doubting the constitutionality of the contested law. The Court invokes the potential of Article 47 of the Rules of Procedure and halts the proceedings if it is evident that repealing or annulling a law in such circumstances would carry the risk of judicial error.

6. **Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?**

As an illustration, **Resolution U.No.40/2020** from 15 April 2020, by which the Constitutional Court did not initiate a procedure for reviewing the constitutionality of the Decision to the dissolution of the Assembly of the Republic of North Macedonia, number 08-1421/1 from 16 February 2020 ("Official Gazette of the Republic of North Macedonia" number 43/2020). The petitioner of the initiative urged that this decision be annulled because it was impossible to hold early elections for deputies under the circumstances of the state of emergency that had been established owing to the COVID-19 crisis. The Constitutional Court did not accept the allegations of the petitioner of the initiative. In particular, the Court declared that the contested decision has its basis in the Constitution from both the perspective of its author and the perspective of the subject matter it addresses. The Court especially emphasizes that: "*The majority of Members of the Parliament proclaimed that the Assembly should be dissolved, and according to the Constitutional Court, the expressed will of the majority of MPs out of the total number of MPs are not in contradiction with the provisions of the Constitution*" and that "*with the contested decision, the Assembly of the Republic of North Macedonia realized its constitutional right to dissolution as indicated in Article 63, paragraph 6 of the Constitution*"

which explains why the issue of its compliance with the provisions of the Constitution was not raised before the Court.

Additionally, in its earlier constitutional case law, the Constitutional Court has never problematized the territorial division of the state, that is the changes to the borders of the municipalities. The territorial division is carried out by a law passed by the Assembly of the Republic of North Macedonia and which, after its adoption, very often comes before the Constitutional Court. We use **Resolution U.No. 195/2004** from 29 December 2004, as a case in point, in which the Court decided not to initiate the proceeding for review whether the Law on the Territorial Organisation of Local Self-Government in the Republic of Macedonia ("Official Gazette of the Republic of Macedonia" no. 55/ 2004) was constitutional. The petitioners believed that this Law did not follow the Constitution because it was not approved by the required number of votes in the Assembly and because the results of local referenda in which residents supported the permanence of municipal borders were not taken into consideration when it was approved. In reference to the constitutional provisions that regulate local self-government, the Constitutional Court stated that the contested Law has a constitutional basis because Article 116 of the Constitution provides for the territorial division of the Republic and the areas of the municipalities are determined by law and leaves the regulation of all matters from these areas to be in the sole jurisdiction of the Assembly of the Republic of Macedonia as the representative body of all citizens and the holder of the legislative power of the Republic. Regarding the allegations from the initiative, specifically, if the legislator had in mind the outcomes of the citizens' statements in the referenda in the local self-government units during the process of adopting the contested laws, the court noted that it is a factual question that the Constitutional Court does not have the competence to decide.

7. **“The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene”. Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?**

Examples that bolster the point made in the question can be found in constitutional case law. The choice of the electoral system of the state serves as the best illustration for the argument that political matters should be decided by democratically elected authorities. The Electoral Code was specifically the focus of constitutional case law in the case of **U.No. 2/2012**. The petitioner contested the Electoral Code as a whole as being in violation of the Constitution because, in his view, it did not guarantee the equality and equality of the right to vote of the citizens. In order to allow for the adoption of a new law that would alter the election model, the petitioner with the idea urged the Constitutional Court to completely repeal the Electoral Law. In the Resolution by which the Court did not initiate a proceeding for a review of the constitutionality, it stated the

following: "*The fact that the petitioner, starting from the negative effects of the mathematical calculation of the established electoral model in the Republic of Macedonia, perceives a violation of the constitutional provisions and proposes a change of the established model, cannot constitute grounds for expressing doubt from a constitutional point of view that the contested Electoral Code as a whole is in accordance with the Constitution. In addition, the number of political parties, coalitions of political parties, and voter turnout all play a role in whether a certain electoral model has more or less negative consequences on the mathematical calculations after elections are held in a given election period, and that is not a matter for the Constitutional Court to be involved with, rather, it is a matter of the legislative power up to the limits as long as such effects do not violate the constitutional guarantees in the sphere of civil and political rights established by the Constitution. Therefore, according to the Court, the legislator has the authority to choose the electoral model while abiding by the constitutional guarantees for the right to vote, the principles of equality, political pluralism, and free and democratic elections, as well as taking into account the recognised electoral models in the states.*" (**Resolution U.No. 2/2012** from 11 April 2012).

Other than choosing the electoral system and other related matters, the Constitutional Court has no jurisdiction over acts passed by the Parliament in connection with elections, such as the Resolution for early parliamentary elections. Referencing previously established constitutional case law that decisions on election announcements do not have the character of a regulation that is eligible for a constitutional review, the Constitutional Court emphasised the following in **Resolution U.No.168/2020** from 3 June 2020: "*The contested Resolution does not contain general norms of conduct, that is, it does not regulate relationships in a general way. Based on its form and legislator, it belongs to the category of legal acts that have an individual character, meaning that choices are taken with regard to particular legal situations in which the use of a general rule has been exhausted. The contested resolution does not generally regulate legal relations, according to the content. The contested resolution does not change or add to the system of general election regulations because it does not specify the requirements for electing Members of the Assembly, the election process, or the timing, i.e., the deadlines by which the elections must be conducted, and its role should only be completed by applying the general regulations governing the election deadlines to the particular instance of the election of Members of the Assembly for the Republic of North Macedonia, which will be completed by carrying out the electoral acts.*" Therefore, the initiative was rejected by the Constitutional Court.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

Yes, the Constitutional Court of the Republic of North Macedonia does, in fact, adopt the general principle of deference in judging penal philosophy. According to the Constitutional

Court, the Criminal Code, which specifies criminal acts and associated sanctions, is an instrument through which the legislator establishes the penal policy. The Constitutional Court has thus far reviewed this Code numerous times. The Constitutional Court bases its decisions in these matters on the fundamental concepts of the rule of law and the necessity of precise and clear legal standards. The court stated that criminal law norms should be explicit and unambiguous since they have the potential to impair very significant human rights (such as the right to freedom and security of the person, the right to a fair trial, the presumption of innocence, etc.). The Constitutional Court reviewed the constitutionality of the Criminal Code clause that defined the crime of *Malpractice in the Service* in Resolution **U.No. 10/2008** from 27 February 2008. In reviewing the constitutionality of this provision, the Court took into account: "*It is significant whether it clearly and precisely contains all the elements on the basis of which the criminal liability of the perpetrator for his illegal behaviour can be determined. This specifically relates to the execution action, which must be specified in the legal description in accordance with the legality principle. This ensures that only conduct that fits the legal description can be brought under that provision and considered a crime. The legislator, and not the Constitutional Court, determines the legislative-legal method to be used to determine the description of the enforcement action.*" The Court found that the contested section of Article 353-v (335-в) of the Criminal Code contains all the essential components of the crime of malpractice in the service (the perpetrator, the act of commission, the consequence, and the punishment) and did not raise the issue of whether it complies with the provisions of the Constitution.

The Constitutional Court typically exercises judicial deference in cases when the petitioner of the initiative contests the criminal law provisions simply on the basis of the penalty, or whether it is high or not: "*regarding the allegations from the initiative that the prescribed punishments were disproportionate and excessively strict, The Court determined that the prescribing of punishments and the scope of punishments is a matter of the state's legislative penal policy, which is not a matter for which the Constitutional Court is in competence"* (**U. number. 273/2009** from 15 September 2010).

Therefore, the decision about the nature and scope of the punishment for the Court is a matter of penal policy, which falls under the sole competence of the legislative power.

When penal-legal standards are questioned purely on the basis of how they are applied in particular situations, the Constitutional Court also defers from reviewing those standards. In case **U.No. 87/2015** (Resolution from 25 May 2016), the Constitutional Court emphasized the right and obligation of regular courts to apply those norms in the specific cases that will come before them, affirming the legislative right of the authority to transform the penal policy into legal norms, stating the following: "*the application of the principle of the lenient law (lex mitior) is a matter for the court that applies the law in specific cases and is not a matter for the legislator, nor for the Constitutional Court. The constitutional provision of Article 52 Paragraph 4 forbids laws from having a retroactive effect (with the anticipated exception for the more favourable law), but it does not impose the obligation to the legislator in the laws from the*

criminal law field to provide retroactive application of the more lenient law in the transitional and final provisions because it is a matter that is decided by the court that determines the criminal responsibility of a person. Therefore, the question of whether to apply a more lenient law to those who commit crimes is a specific one that is assessed case by case by the criminal court. It is not a matter that would be generally decided by the legislator, nor is it a question that would be evaluated in an abstract manner by the Constitutional Court during the process for reviewing constitutionality."

Amnesty is also regarded as a matter of state criminal policy, outside the jurisdiction of the Constitutional Court. After the nation's independence, amnesty was applied multiple times, and almost always, amnesty laws were challenged before the Constitutional Court, which either rejected the initiatives or found no violation of the Constitution. One of the latest examples is the one from 2020 when the Constitutional Court, with **Resolution U.No.1/2019** and **U.No.6/2019** from 22 January 2020, did not initiate a proceeding for reviewing the constitutionality of the Amnesty Law ("Official Gazette of Republic of Macedonia" No. 233/2018), in general. The Court emphasized that the legislator determined the type of amnesty in the Amnesty Law, and the Constitution does not consider whether the Constitutional Court or someone else thinks it is necessary or not for individuals covered by the Law to be amnestied, not amnestied, or others to be amnestied, (The Constitutional Court cannot take on the responsibilities of the Parliament in its place), however, regardless of whether the Parliament was authorised by the Constitution to act as it did. The Court emphasized that: "*the constitutional right of the Parliament to grant amnesty, means its right to choose the category of individuals who will be included in the amnesty as well as the degree, i.e., to whom the amnesty applies and to whom it does not in the context of what is required by law, the question of the compatibility of the contested provisions of the Amnesty Law with the provisions of the Constitution cannot be raised before the Court."*

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The provision of the Law on the National Security Agency that stated that a candidate for director, deputy director, or employee in the Agency must not have the citizenship of another country was not found to be inconsistent with the constitutional principle of equal access of citizens to employment in state bodies (Resolution in the case **U.No.112/2019** from 24 June 2019). For the Court, the decisive criterion in the review of the constitutionality of this provision was "*the competences and specificities of the Directorate for Security and Counterintelligence as a special body that carries out the tasks of the state security system that relate to protection against espionage, terrorism or other activities aimed at threatening or destroying the democratic institutions established by the Constitution of the Republic of North Macedonia with violent means, as well as protection from more serious forms of organized crime*". The Court

also pointed out the sensitivity of the subject of regulation of this law, as well as the seriousness of the field of action, i.e. the competence of the National Security Agency, so that the contested legal framework provides the impartial and objective performance of work responsibilities at workplaces and is a requirement for the effective operation of the Agency in its role of defending the security of the state. The power of the legislator to establish more stringent hiring standards for the National Security Agency was affirmed by the Court "*in order to establish the circumstances for the Agency to work more effectively and with greater accountability and at the same time, it would be excluded that any elements of suspicion would surface that would render the personnel unfit to carry out tasks relating to the identification and mitigation of security threats and risks to the national security of the state.*"

With Resolution **U.No.122/2019** from 23 September 2020, for the same grounds and using the same justification, the Constitutional Court later rejected the initiative of a person employed by the Agency who lost his employment in the Agency and was transferred to another position in the Ministry of Internal Affairs as a result of the application of the contested restriction.

In a case from earlier constitutional case law (**Resolution U.No.84/2001** from 14 November 2001), the Court reviewed the constitutionality of the provisions of the Law on Procurement, Possession and Carrying of Weapons, which regulated the circumstances under which the competent authority could refuse to issue a permit for the purchase and carrying of weapons. The court considered that: "*the issue of carrying and possessing weapons is one that requires the existence of a certain level of discretionary power on the part of the authority, depending on the specifics of each request, and from that aspect, the legal restrictions on the possession of weapons are at the same time legally limited to the discretion of the competent authority which affects the provision of legality in decision-making in general*" and that defining the conditions under which a request for a possession of a weapon is denied "*are legitimate grounds within which the discretion of the competent authority may act, ensuring the legality of its decision on that matter, fulfilling the elementary requirement of the principle of the rule of law. In that situation, the citizen's prior conviction, the ongoing criminal proceeding, and the assessment of the authority for potential weapon misuse cannot be viewed as evidence undermining the presumption of innocence or the credibility of the individual*". The court did not raise the question of the constitutionality of the legal provisions because it considered that taking into account the impact of prior convictions for specific crimes is proportionate to the overall goal of the Law of enabling the possession of weapons when there is a justified need for it and has no implications for public safety.

In the case **U.No.2/2004** (Resolution to reject the initiative of 19.05.2004), The provisions of the National Concept for Security and Defense were not subject to a review of constitutionality and legality by the Constitutional Court ("Official Gazette of the Republic of Macedonia" no. 40/2003) which formed the Management Committee, a body headed by the President of the Government and composed of some ministers, for assessment and decision-making in respect to the security of the Republic during times of crisis and crisis situations. The petitioner claimed

that this Act was unconstitutional since it only recognised the terms military and state of emergency, not crisis situation or crisis and that the Management Committee, under the direction of the President of the Government, the role between the President of the Republic as supreme commander of the armed forces and president of the Security Council of the Republic of Macedonia (Article 86 of the Constitution), and the President of the Government as the holder of the other executive authority was divided in an inappropriate manner, and that limits the powers of the Supreme Commander and the President of the Security Council of the Republic of Macedonia. "*Commencing with the content of the National Security and Defence Concept, as a fundamental document for the security and defence of the Republic of Macedonia that establishes stances and communicates the viewpoints of the country on its national interests, its environment for security, the strategy of national security as well as the aims, directions, areas and instruments for its realization and perceptions and attitudes towards defence*", the Constitutional Court judged that this document is not a regulation as defined by Articles 51 and 110 of the Constitution and that it is not subject to constitutional review.

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

Throughout the whole era following the independence of the Republic of North Macedonia, reforms in the judiciary have been ongoing with varied degrees of intensity in order to improve the protection of human freedoms and rights, and strive to bring its legislation and practises closer to and in line with those of the European Union. Throughout the process, numerous judiciary laws were amended such as the Law on Courts, the Law on the Judicial Council, the Law on the Council of Public Prosecutors, the Law on the Academy for Judges and Public Prosecutors, the Law on Salaries of the Judges, and other laws governing court proceedings. However, the Constitutional Court is not a part of the justice system and the judicial authority, nor is it a factor in the process of reforms in the judiciary. The Court is unable to actively influence that process in terms of initiating the course that the reforms ought to take because it is a matter of politics that the Government of the Republic of North Macedonia is responsible for. Of course, the laws and other regulations adopted by the Parliament, the Government, and other state bodies within the framework of these reforms can be subject to constitutional-judicial control, so the influence of the Constitutional Court is indirect and only becomes apparent after the adoption and entry into force of the laws that are the result of judicial reforms. However, even if the Constitutional Court determines that there are sufficient grounds to interfere in these laws, it does not have the authority to impose on the legislator a timetable by which the contested law must be passed or changed, nor it is authorised to provide guidance to the legislator on how the legal requirements should stand, and in practical terms, the Constitutional Court cannot directly influence the process of amending the legislation in the field of the judiciary. The Constitutional Court also has no role or participation in constitutional reforms and has no

authority to evaluate constitutional amendments, neither before nor after their adoption by the Assembly.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

The analysis of constitutional case law does not provide sufficient evidence to draw the conclusion that the Constitutional Court is more deferred when it comes to acts passed by the Parliament than when it comes to acts passed by the executive power. (According to Article 12 of the Rules of Procedure of the Constitutional Court) The process before the Constitutional Court begins with the submission of an initiative, by any individual or a legal entity, to initiate a proceeding for constitutional review of a law, the constitutionality and legality of a regulation, or any other general act. However, according to Article 14 Paragraph 1, the Constitutional Court may start proceedings for constitutional judicial control on its own initiative. Participants in the proceedings before the Constitutional Court include both the petitioner of the initiative and the adopter of the act. The decision of the Constitutional Court to initiate a proceeding for reviewing the constitutionality and/or legality of a particular act is not influenced by the capacity of the adopter of the act, nor does the process differ depending on which state body adopted the act. The fundamental criterion in decision-making is the nature and content of the contested act, or whether it is an individual act or a general act of a normative nature, i.e., a regulation that regulates relations generally. This is a fundamental criterion for determining the Constitutional Court's capability to review the legality and constitutionality of the contested act, whereas the general acts or regulations are subject to constitutional and judicial assessment, while individual acts can only be subject to assessment only in regular courts, and not before the Constitutional Court. The Constitutional Court bases its analysis of the constitutionality of a law, or the legality of a regulation, primarily on its content rather than the fact that it was adopted by a particular state body. The Constitutional Court often works within the parameters of the request established by the initiative, although it is not constrained by the justifications emphasised in the initiative while reviewing the constitutionality and/or legality of the contested act. The provisions of the regulation or other general act that are not subject to review under the initiative may be reviewed by the Court for their constitutionality and legality in accordance with Article 14 Paragraph 2 of the Rules of Procedure of the Constitutional Court. The Court may also review a regulation for other reasons that are not specified by the petitioner.

In constitutional case law, there are instances where an initiative for the Court to review a by-law act adopted by the executive power was made, but during the proceeding, the Court

determined that the legal justification for the adoption of the contested by-law act was in violation of the Constitution. As a result, the Court initiated a procedure to review the Law and on its own, and repealed the disputed provisions (**Resolution U.No. 208/2001** from 22 May 2002 and **Decision U.No. 208/2001**).

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The Court takes the history of the adoption of the laws into consideration, and every time a petition contesting a law passed by the Parliament is submitted to the Constitutional Court, the Court requests that the Parliament provide an opinion on the petition (Article 18 of the Rules of Procedure of the Constitutional Court). Article 13 of the Rules of Procedure of the Constitutional Court states that both the petitioner of the initiative and the adopter of the act must participate in the court's proceedings, so that by requesting an opinion, it is possible to hear the opinion of the adopter of the act in the proceedings before the Constitutional Court, that is, of the Parliament as a legislative body. During the analysis of the initiative in the previous procedure, the Constitutional Court established a practice whereby, whenever a contested law is in question, in addition to the opinion of the Parliament, a request for the Draft Law with the Rationale is also necessary, in order to determine the motivations behind the enactment of the legislator of the contested law and the objectives that should be met with the suggested legal solutions. This is crucial when it comes to laws that directly affect how citizens can exercise their freedoms and rights, particularly when those laws impose limitations on how those rights can be exercised. In such a situation, insight into the legislative background aids the Constitutional Court in determining the legitimate purpose of the law as one of the steps in applying the proportionality test. Sometimes, even in the Resolutions or the Decisions made in response to the submitted initiative, the Court states the justifications provided in the Explanatory Memorandum of the Draft Law for which it was adopted.

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The assessment of the Court is restricted to the analysis of the justifications for the adoption of the law that the adopter of the act underlined.

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?

The debates that take place in the Assembly of the Republic of North Macedonia throughout the process of passing a law typically have no impact on the procedure and decision-making of the Constitutional Court. In the previous procedure, the Constitutional Court may, if it deems it necessary, request the Assembly to provide it with transcript notes from the sessions of the Assembly where the law being contested before the Constitutional Court was debated, however, this has no influence on the decision-making of the Constitutional Court and the Court does not address this matter in the final decision. The Law on Prevention and Protection from Discrimination, which was adopted in May 2019 after extensive and serious debates in the Parliament and the public broadly, and which expanded the grounds on which citizens can request protection from discrimination, such as sexual orientation and gender identity, was completely repealed by the Constitutional Court in 2020. The Constitutional Court stated that the reason for the repeal was an oversight in the procedure for its adoption, specifically that the Law was not passed with the required majority after the second consideration of the Assembly after the President of the Republic initially exercised his right of veto and refused to sign the decree. (**Decision U.No. 115/2019** from 14 May 2020). The Court stated its opinion that: "*due to the fact it was submitted to the vote a second time following the previous veto of the President of the Republic, ...in that case, the law gets greater legitimacy, and it should be passed by an absolute majority of votes as required by Article 75, Paragraph 3 of the Constitution, a standard that, in the norm of the Court, is an imperative legal standard."*

This decision of the Constitutional Court drew an extensive amount of public criticism because it created a legal gap in a very important area, which is the protection of citizens from discrimination because they were left without a legal foundation and without a mechanism for protection against discrimination. The decision was made under the particular circumstances of a state of emergency being declared due to the global coronavirus pandemic, with a technical government, and under the conditions of a dissolved Assembly, so owing to these circumstances, new parliamentary elections had to be held, and the law had to be re-adopted with the required majority.

The Law on Administrative Disputes ("Official Gazette of SFRY" No. 4/77 and 36/77), which dates from the time of the former Socialist Federal Republic of Yugoslavia, takes a different approach that could be seen as a type of judicial deference. With **Resolution U.No. 43/1998** from 3 July 2002, the Constitutional Court initiated a proceeding to review the constitutionality of the Law as a whole and determined that it was not in compliance with the newly established Constitution following the independence of the Republic of Macedonia.

However, the Constitutional Court deferred making a final judgement until the new Law on Administrative Disputes was passed in 2007 in order to prevent a legal void from forming and to prevent depriving citizens of a legal remedy in the domain of judicial control of administrative acts and discontinued the constitutional review proceeding. (Resolution to initiate a proceeding U.No. 43/1998 from 3 July 2002) (Resolution to discontinue the proceeding U.No. 32/1998 from 20 May 20, 2007)

15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?

The Court does not analyze whether all issues raised by the law or measure were fully covered in the parliamentary debate.

16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

It has been recognised that the democratic legitimacy of legislation or decision is significantly impacted by the fact that it was passed by the Parliament, which holds the legislative authority. However, this does not preclude the Constitutional Court from conducting constitutional-judicial control over such an act or decision, as a result of the role of the Constitutional Court as the keeper of legality and the regulator of the legislative power, it has the authority to either annul or repeal it if it determines that it is against the law.

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

No.

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

In general, it cannot be stated that the fundamental right in matter determines the level of deference by the Constitutional Court. However, there are instances in the case law, regarding certain rights during the constitutional and judicial review of the applicable laws regulating these rights, which show that the Constitutional Court acts with extreme caution and strictness, particularly by stressing the need for precise legal standards or specific protection of fundamental rights. For example, custody is the strictest tool to assure the presence of the accused in criminal proceedings because it restricts freedom, a fundamental human right that is intrinsically tied to the human individual. The Constitutional Court repealed the provisions for mandatory custody for offences carrying a mandatory life sentence with **Decision U.No. 34/2005** from 31 May 2006. The judge is prevented, based on his free judicial conviction and thorough and careful assessment of the facts and evidence, from determining whether there are grounds for determining custody established in the Law on Criminal Procedure because the court is required to impose a measure of custody for these crimes only due to the severity of the sentence of life imprisonment. The Court explained its reasoning for its Decision by stating that the requirement of mandatory custody changes the constitutional authority of the Court to determine whether imprisonment is necessary and legal as the strictest measure to guarantee the appearance of the accused in criminal proceedings, and the legislator only explicitly requires the court to make a custody determination by means of this imperative standard. Deciding whether an obligatory custody order must be made by the court only because the Law imperatively mandates it, indicates that the legislator, not the court, decided on the measure of custody for specific crimes, and therefore, the Court found this provision violates the fundamental principles of the rule of law, the separation of powers, and the right to the presumption of innocence.

The right to privacy, the monitoring of communications, and the protection of personal data are other areas where the Constitutional Court exercises relatively stringent control over the validity of laws. The Constitutional Court points out the necessity of clarity and precision in the legal provisions governing the authorization of state authorities to monitor communications in its analysis of those provisions in light of the constitutional provisions protecting personal privacy: "*The regulations controlling the monitoring area must be clear sufficiently precise and predictable, not allowing for improvisations or interpretation in order to avoid endangering the safety of anyone to whom that legislation may apply, and to refrain from interfering in an illegal and unconstitutional way with freedom of association and freedom of correspondence.*" (The Constitutional Court annulled a number of provisions of the Law on Electronic Communications in **Decision U.No. 139/2010**, which was issued on 15 December, 2010)

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The Court stated the following in the aforementioned Decision on the Law on Electronic Communications: "*Although covert monitoring techniques and approaches are aimed at disclosing the substance of communications to stop or identify crimes, it would be achievable to conduct criminal preoceedings or if it is necessary for the security and defence of the Republic, according to the Court there are insufficient guarantees against potential abuse by the authorised authority in the contested provisions of the Law, this is due to the requirement that the provisions regulating the monitoring area be sufficiently detailed and predictable, without improvisation or interpretation so as to avoid endangering the privacy of anyone to whom that law may apply, or, to be more specific, the legislation governing the use of communications monitoring measures should include a crystal clear illustration of the situations and conditions under which the public authority is permitted to deploy such a measure, the process used to monitor communications, the circumstances in which it has its own justification, and the body that issues the order to monitor communications. Everything else is opposed to the rule of law and moves in the direction of unlimited power.*" Due to the uncertainty of the expressions employed, the absence of regulations regarding the circumstances and methods by which the constitutionally granted right to privacy may be violated, in that case, the Constitutional Court found that they pose a genuine risk of arbitrary and capricious state interference in private affairs and correspondence of the citizens, which could harm their honour and reputation without any legitimate legal or constitutional justification.

Contrarily, the Constitutional Court found that the legal provisions of the Law on Internal Affairs, regulating the use of firearms by law enforcement officials, are sufficiently definite and clear and do not call into question the protection of the right to life provided by Article 10 of The Constitution. As a result, the Constitutional Court decided not to initiate a proceeding for a review of the constitutionality of the contested provisions in **Resolution U.No. 10/2006** from 22 March 2006, concluding that: "*The constitutional inviolability of the right to life, bodily and moral integrity of an individual cannot be opposed to the use of coercive measures, including the use of weapons, within legally established parameters and properly established out procedures. The analysis of the content of the contested legal provision shows that it does not violate the fundamental freedoms and rights of a citizen or an individual, because it specifies exactly when an authorised authority will use a firearm in each scenario, that is, it clearly states the circumstances under which an authorised official from the Ministry of Internal Affairs may employ the same. In the contested legal provision, the use of weapons by the authorised official is only permitted if it is essential in the circumstances that are listed. Thus, it follows logically that the guaranteed inviolability of human life is not always violated when law enforcement authorities employ firearms, and especially not where it was required to protect societal and citizen interests against criminality.*"

The request for clarity and precision of legal norms is considered by the Constitutional Court as an integral part of the principle of the rule of law, which is a fundamental value of the constitutional order of the Republic of North Macedonia according to Article 8 Indent 3 of the

Constitution. In the case **U.No.87/2015** from 25 May 2016, the Constitutional Court reviewed the constitutionality of several provisions of the Law on Offences (see "Official Gazette of the Republic of Macedonia" no. 124/2015) and pointed out the following: "*The principle of the rule of law requires legislators to formulate precise, unequivocal, and explicit legal norms because only as such can serve as a strong foundation for actions of the state authorities, which indicates that the concept of the rule of law cannot exist without clear and defined rules that ensure the legal security of the citizens. The rule of law implies the consistent application of legal regulations, which should be broad, properly defined, and unambiguously formulated. Given the oppressive nature of criminal sanctions and their propensity to intrude on fundamental human rights, this is especially important for the area of criminal law.*"

We quote **Decision U.No. 109/2022** from 23 May 2022, as an illustration of modern constitutional case law, in which the Constitutional Court interpreted the principle of the rule of law and the demand for precision and clarity of legal norms as follows: "*The principle of the rule of law in a legal system or order should be realized through the dominance of the legal norm which should be clear, precise and understandable, which won't leave the citizens with the chance of a different interpretation, its different application, or the chance of legal uncertainty. One of the primary criteria of the fundamental value of the constitutional order, the rule of law and the principle of legal certainty as its integral element, is that legal norms be accessible to the addressees. This aims for those whose rights and obligations are determined by the norms, to be familiar with their content and, based on that, to adjust their behaviour. Legislators are required to conceptualise exact, unequivocal, and explicit rules that will ensure citizens' legal security as a component of it, which was not done in this particular case.*"

20. What is the intensity review of your Court in case of the legitimate aim test?

There is no predetermined procedure, nor predetermined criteria on the basis of which the intensity of the control of the Constitutional Court over the acts of the legislative and executive authorities is determined, considering the characteristics and specifics of each case, as well as certain other criteria, such as for example, the quality of the law that is being reviewed, the arguments offered by the adopter of the act for the content of the contested provisions, the subject of the law, etc. The Constitutional Court applies the test of proportionality in cases where the subject for a review is the restriction of specific citizen rights in order to ascertain whether there is a legitimate reason for the adoption of such provisions and whether they have an objective and reasonable justification, i.e. whether they are proportionate to the goals that the adopter of the act wanted to achieve.

The Constitutional Court specifically utilised the proportionality principle in instances involving the Covid-19 epidemic, which involved the measures and restrictions on freedoms and rights that were imposed during the state of emergency. From a constitutional and legal

standpoint, the Constitutional Court did not find it necessary to contest the authority of the government to pass decrees with binding legal effect, but it did note that this power is limited and should not be used, in particular, to refer to rights from which there can be no exceptions under any circumstances (Article 54, Paragraphs 3 and 4 of the Constitution): *"...during the existence of a state of emergency, the Government may regulate differently certain matters that are governed by legitimate laws, it may establish new deadlines, it may change the existing, and it may introduce new solutions. But such powers are not unlimited. There are two constitutional restrictions on the ability of the Government to make decrees with binding legal effect. The first is that the ordinances govern necessary actions that are functionally related to directly or indirectly addressing and resolving the causes and effects of the state of emergency, while also taking into account that the actions must have a legitimate purpose, be socially justifiable, and be reasonable and proportionate in light of the quickest return to normal state (which will essentially meet the requirements of Articles 125 and 126 of the Constitution). The second restriction is regulated by Article 54 of the Constitution, which stipulates that restrictions on freedoms and rights during a state of emergency cannot be made in a way that is discriminatory against anyone based on their gender, race, skin colour, language, religion, national or social origin, property, or social status. The right to life, the prohibition of torture, inhuman and degrading treatment and punishment, the legal certainty of criminal acts and punishments, as well as the freedom of belief, conscience, thought and religion cannot be restricted in a state of emergency.*"

The Court determined that the Covid-19 pandemic, which has been proclaimed a state of emergency, is closely related to the suspension of election operations, that it is consistent with the purpose of the emergency, and that it will continue until the emergency ends, that the electoral process through which the right to vote is exercised will continue from the day the state of emergency ends, and for this reason, it determined that the measure has a legitimate purpose, social justification is reasonable, and is proportionate to the goal that is to be achieved — returning to a normal state. For the Court: "*As a fundamental value of the constitutional order of the Republic, the protection of the lives and health of the citizens, the basis for which the state of emergency was declared and the measures taken under it, is inviolable and the highest values that are at the top of the civil and political freedoms and rights protected by the Constitution. As a result, the decision to postpone the polls due to the emergency situation is justified by the fact that protecting the lives and health of the people is of the highest priority… In light of the fact that the Parliament has been dissolved, members of the Parliament will have to be chosen by conducting elections, and the Republic of North Macedonia has also declared a state of emergency, according to the conclusion reached by the Court, the Government did not suspend the Parliament, as claimed in the initiative, but rather acted in accordance within its constitutional powers under emergency circumstances, which did not violate the constitutional provisions as cited by the petitioner in the initiative.*" (cited from **Resolution U.No. 42/2020** from 14 May 2020 by which the Constitutional Court did not initiate a proceeding for

reviewing the constitutionality of the Decree with legal force on matters related to the electoral process ("Official Gazette of the Republic of North Macedonia" no. 72/2020).

As a result, the Constitutional Court, applying the test of the legitimate aim, determined that the measures and restrictions that were directly related to the state of emergency brought on by the pandemic and that were intended to restore normalcy were reasonable, necessary, and proportionate and that they were not a matter in question, in contrast to those that were unrelated to the pandemic.

Therefore, with **Decision U.No.209/2020** of 23 September 2020, the Constitutional Court annulled the Decree with legal force on the application of the Law on Construction during the State of Emergency, which, in addition to other concerns, regulated matters relating to beach lease agreements. The Court held that: "*It is neither essential nor legitimate to regulate the interactions between the tenants of building sites adjacent to beaches. Breaching of rights and obligations of the tenants, as well as their powers and authority, through legal regulation through ordinances with legal force, and under the circumstances of a widespread epidemic in which the citizens on the territory of the Republic of North Macedonia find themselves, could have a basis if the restriction measures are proportionate and connected to the outcome in order to meet the defined health objectives to put an end of spreading the epidemic*", which was not the case with the contested decision, and as a result, the Court annulled it as being violating the Constitution.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Court uses the traditional proportionality test, aiming to take into account all factors, or phases, in the assessment of proportionality (adequacy, necessity, and proportionality in the more narrow sense of the word). As an illustration, in the case **U.No. 39/2006**, with a Decision from 6 June 2007, the Court repealed some of the provisions of the Law on Protection from Smoking, which forbade the sale of cigarettes in establishments more than 50 metres or less away from preschools and educational institutions. The Court unquestionably found that the prohibition on the sale of cigarettes in the locations covered by the contested legal norm is considered a restriction, i.e., an obstruction to the freedom of the market and entrepreneurship, but that the goal of the restriction is to protect the health of minors as a matter of public interest, which the Court found to be a legitimate objective: "*Moving on to the topic of establishing a balance between personal and societal interests, it is important to determine whether the imposition of this type of measure is actually necessary to such an extent, to protect the health of the people, i.e. minors, in a way that would justify the restriction of the market, i.e. the right of freedom in the market and entrepreneurship. According to the Court, the imposition of such a measure, as*

provided in the contested legal norm, is neither necessary nor actually beneficial in achieving the legitimate goal of protecting children, as it follows from the entirety of the Law on Smoking Protection, with the pronounced general measure in Article 5 of the Law on Prohibiting the sale of cigarettes and tobacco to people under the age of 18 in the retail trade, the legislator has already achieved its constitutional obligation to protect the health of the young population (children). As a result, the general prohibition stated in Article 5 of the Law has achieved the intended effect and purpose of the Law, rendering the additional restriction on the sale of cigarettes contained in the contested legal provision excessive, unnecessary, and only appearing as an economic restriction and obstruction of the right to freedom of the market and entrepreneurship. Therefore, the restriction in the contested provision cannot pass the test of proportionality with the legitimate objective and fails in achieving a fair balance between personal and public interest."

Another instance in which the Constitutional Court applied the proportionality test is the case **U.No.189/2012** (Decision from 25 June 2014) involving the right to leave the country, ensured by Article 27 of the Constitution. The Court repealed the provision in the Law on Travel Documents that allowed for the confiscation of a passport in the scenario that a person was forcibly returned to or expelled from another country for breaking its entry and stay regulations. The Court determined that: "*The measure itself is excessive and a restriction on the person's freedom of movement, or their ability to travel internationally. Given that the individuals to whom the contested measure is imposed have already been deported, i.e. forcibly returned to the Republic of Macedonia, which means that they are already suffering a certain consequence, It would be logical to forbid them from reentering the country, i.e. the countries whose entry and residence regulations they violated, but by those countries, not by their own country. Rather, the contested measure, which also includes the revocation of the passport for a year, fully deprives these individuals of their ability to leave their own country and travel to any other foreign country, and that measure is applied by their home country. Due to the automatic prohibition on individuals travelling to any location outside of the country, this measure raises questions from the perspectives of the principles of proportionality and the rule of law."*

22. Does your Court go through every applicable limb of the proportionality test?

Refer to the example in the response to the earlier question.

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

There are no such examples.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

From the analyzed case law, it cannot be drawn such a conclusion.

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

Yes, the margin used by the ECtHR is equal to the margin of discretion recognized by the Constitutional Court when reviewing the constitutionality and legality of acts by legislative and executive authority that restrict the freedoms and rights of the citizen, notably when it comes to the application of the proportionality test, which is a direct result of the case law of the European Court of Human Rights.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

Yes, the European Court of Human Rights later reviewed several cases in which the Constitutional Court of the Republic of North Macedonia had rejected requests for the protection of freedoms and rights. In these cases, the court found that the rights of the Convention had been violated and ruled in favour of the applicants. One of those cases is **U.No. 75/2018,** in which a member of the Roma ethnic group alleged that as a minor, he had experienced racialized police aggression for which the prosecution had not carried out a successful investigation. He invoked protection against racial discrimination in the case before the Constitutional Court and requested the Court to annul the judgements of the regular courts that had rejected his claims that he had filed following the Law on Protection Against Discrimination. Following the request for the protection of freedoms and rights, the Constitutional Court did not apply a decision-making process based on merit, but instead, it rejected the case due to non-competence. In particular, the Constitutional Court determined that the petitioner had essentially asked the Court to act as an instance of a higher court and rule that certain court decisions were irregular and unlawful, and thus to begin reviewing their legality, whether the substantive law has been properly applied, which, according to the constitutional standard, is not within the competence of the Constitutional Court. The Constitutional Court indicated that: "The Constitutional Court of the Republic of Macedonia does not have the authority to serve as an instance higher court, in line with its constitutionally established jurisdictions, that will review the legality of the decisions of other judicial authorities, which led the Court to conclude that the requirements of

Article 28 Paragraph 1 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia for rejecting the petition were properly met."

In contrast to the Constitutional Court, which did not conduct a substantive and legal review of the petition, The European Court of Human Rights accepted the application of the petitioner and determined that the alleged acts of police brutality and the lack of a thorough investigation violated Article 3 of the Convention. ((Application No. 173/17) Case X and Y v. North Macedonia; Decision Date: 5 November 2020)

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

The analysis of statistical data on the decision-making process of the Constitutional Court, resulting from the submitted petitions for the protection of rights and freedoms over the past few years led to the conclusion that judicial deference is frequently present in the constitutional case law of the Constitutional Court of the Republic of North Macedonia. In particular, the Constitutional Court handled 56 petitions for the protection of freedoms and rights between 2018 and 2022. In most cases, 40 petitions for the protection of freedoms and rights were rejected, 12 requests were denied, just 3 requests were approved, and a violation was found within the freedoms and rights guaranteed in the Constitution.

The Constitutional Court may reject a petition which it calls for the protection of a freedom or right that is outside of its jurisdiction of the rights over which it has immediate authority to decide according to Article 110 Indent 3. In particular, this article states that the Constitutional Court protects the freedoms and rights of the individual and citizen, including the freedom of conviction, conscience, thought and public expression of thought, political association and activity, as well as the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation. As a result, the Constitutional Court is normatively legally prohibited from preceding a review, i.e., the protection of other rights that are not covered by the cited constitutional provision of Article 110 paragraph 3, and this means that it has limited competence for the protection of only some of the constitutionally guaranteed rights, not all of them.

When deciding on petitions for the protection of freedoms and rights, the control of the Constitutional Court of the judgments of the regular courts is limited only to the matter of whether those judgments violated any of the constitutional rights of the citizen listed in Article 110 Indent 3 of the Constitution. The Constitutional Court does not review the legality of the

actions of the courts and does not review the factual context the courts have created during the process of adjudication. Therefore, if the petitioner makes reference in the request to an incorrectly or insufficiently established factual situation or an incorrect application of the substantive law by the regular courts, the Constitutional Court indicates that it is not in competence to act as an instance court and to review how a law has been applied by the courts and such petitions are rejected by the Court. The Constitutional Court rejects petitions where it determines that the party making the petition for the protection of freedoms and rights did so simply because it was dissatisfied with the outcome of the proceedings before the regular courts, that is if the party wants to make use of the intervention of the Constitutional Court to resolve the case in its favour.

28. Has your Court have grown more deferential over time?

This question cannot be answered with precision because an analysis of the trends in the cases before the Constitutional Court, particularly those involving petitions for the protection of freedoms and rights, reveals that in recent years an increasing number of cases have been decided on the merits by the Constitutional Court, as opposed to earlier times when the Constitutional Court rejected petitions for the protection of freedoms and rights in the largest number of cases for procedural reasons.

29. Does the deferential attitude depend on the case load of your Court?

Deference is not utilized as a tool for reducing the workload of the Court because it is unrelated to the volume of cases.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

Yes, the Rules of Procedure of the Constitutional Court explicitly address this possibility in Article 14 Paragraph 2, according to which during a review of the constitutionality, that is, the legality and constitutionality of a regulation or other general act, the Constitutional Court may review the constitutionality and legality of provisions or other general act that are not contested by the initiative.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

Yes (see the response to the previous question).