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## THE ELECTION OF JUDGES OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA AND ITS INDEPENDENCE

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**Abstract:** According to Article 108 of the Constitution, the Constitutional Court of the Republic of North Macedonia is an organ of the Republic that protects constitutionality and legality.

In the system of protection of constitutionality and legality, the Constitutional Court occupies the highest place. In its work, it is independent of the Parliament, the President of the Republic, the Government and the regular courts. This elevates the Constitutional Court to the level of the highest authority in the protection of constitutionality and legality.

The Constitutional Court is composed of people – judges. There is no independent constitutional court if the judges are dependent. That is why the Constitution pays special attention to this issue by providing mechanisms for placing judges in an independent position from the holders of power and from the holders of political power in the Republic. These mechanisms are: the incompatibility of the office of judge of the Constitutional Court with the performance of another public office and profession or with membership in a political party, the immunity of a judge of the Constitutional Court and the impossibility of a constitutional judge, without his will, being removed from office before the expiration of the term of office, except in the case of being convicted of a crime to an unconditional prison sentence of at least six months or if he permanently loses the ability to perform his function, which is determined by the Constitutional Court itself. It seems that the position of the Constitutional Court in the constitutional order of the Republic of North Macedonia established by the Constitution of the Republic, provides the Court with functional independence.

However, practice shows that, with regard to the independence of the Constitutional Court, the normative regulation, prescribed by the provisions of the Constitution, is not always in accordance with the factual. Functional independence of the Constitutional Court is not possible without its personal and financial (budgetary) independence. The paper reviews the problem of the functional independence of Court from the aspect of the election of its judges.

**Keywords:** constitutional court, judge, election, independence

### 1. INTRODUCTION

The Constitutional Court of the Republic of North Macedonia exists and operates in a turbulent environment characterized by sharp contradictions and conflicts between the holders of political power. Those in power often see the Constitutional Court as an instrument for protecting their political interests incorporated in the laws passed by the Assembly in which they have a majority of representatives. Those in opposition often see it as an instrument for protecting the interests of the ruling party, which are most often contrary to their interests. Therefore, the Constitutional Court often finds itself in a clinching position between the two (Stojanovski and oth. 2016). This undoubtedly complicates its position as a politically neutral body whose primary task is to protect constitutionality and legality in society, regardless of which of the holders of political power is in power or in opposition (Risteska, Shurkov, 2016).

In a turbulent and uncertain political environment, two dangers are looming that are detrimental to the position of the Constitutional Court in the function of protecting constitutionality and legality.

The first danger is that it politicizes itself with the aim of using the protection of constitutionality and legality only as a cover for its own imposition as a political factor. The second danger is that it merges with the political power and, instead of actual constitutionality and legality, ensures apparent constitutionality and legality in accordance with the interests of the ruling party (Škarić, 2004), The Constitutional Court of North Macedonia faces second danger.

If the Constitutional Court, according to the Constitution, is a politically neutral body and as such stands on the bulwark of the protection of constitutionality and legality, the Assembly of the Republic as the body that elects the judges of the Constitutional Court is not politically neutral. The Government has the greatest influence on it, which, through the number of representatives In the Assembly, practically exercises control over its work.

It can hardly be said that the President of the Republic is politically neutral, although, as the president of all citizens of the Republic, he should be. The Constitution prohibits him from holding office in a political party, but does not prohibit him from being its member, and especially a sympathizer.

The Judicial Council of the Republic of North Macedonia, whose members are prohibited by the Constitution from being members of political parties, should be politically neutral. However, practice has shown, for many years, that it is not.

So, political bodies decide on, according to the Constitution, a politically neutral – non-political Constitutional Court, namely: the Assembly as the body that elects the judges, the Government as the body that has the greatest influence in the Assembly, the President of the Republic and the Judicial Council of the Republic, as bodies that propose each two judges to the Constitutional Court. In conditions of a turbulent and uncertain political environment, everyone who has, at least a little, political power and authority would like to have “their own man” in the Constitutional Court. This is precisely where the danger of electing “suitable” judges to the Constitutional Court lies. If a constitutional judge is suitable for the government that proposes and enacts laws, he is not suitable for protecting constitutionality and legality. Such a “suitable” constitutional judge will always lean towards the interests of the government, to the detriment of constitutionality and legality (Biagi and oth., 2022).

## **2. ELECTION OF JUDGES OF THE CONSTITUTIONAL COURT**

According Amendment XV, in conjunction with Article 84, paragraph 4 and Amendment XXIX, paragraph 1, paragraph 7 the judges of the Constitutional Court are elected by the Assembly of the Republic of North Macedonia by a majority vote of the total number of representatives. The Assembly elects three judges by a majority vote of the total number of representatives, where there must be a majority vote of the total number of representatives belonging to the communities that are not in the majority in the Republic of North Macedonia (Badenter majority).

The judges of the Constitutional Court are elected from among prominent jurists.

Within the framework of their constitutional competences, two judges of the Constitutional Court are proposed by the President of the Republic and two by the Judicial Council of the Republic.

The mandate of the judges lasts nine years without the right to re-election. According to some experts, the mandate of the constitutional judges, set in this way, makes it impossible for a ruling coalition to "appoint" - elect all constitutional judges from among "its own people". We could not agree with such a view because practice shows that, in the event of a certain ruling coalition remaining in power for a longer period, there is a possibility that all judges of the Constitutional Court will be from the ranks of “ours” – “their own people” who are expected to obediently act on the orders of the government.

The composition of the Constitutional Court and the method of electing judges should be in the function of its independence from the holders of authority and power in society. However, it is precisely through the election of judges that the political decision-making bodies can exert influence on the work of the Constitutional Court for the protection of constitutionality and legality.

In such conditions, the Constitutional Court can impose itself as an authoritative protector of constitutionality and legality only if it is composed of people with great professional knowledge, with a highly developed sense of responsibility to society and citizens, with a developed legal and social imagination to perceive the vision imposed by the establishment and strengthening of the rule of law, the guarantee of human rights and civil liberties and other goals of the constitutional order of the Republic of North Macedonia established by the preamble of the Constitution; as well as with a high degree of personal courage to fight for its realization, regardless of the risk they may incur due to the disagreement and dissatisfaction of the holders of political power.

On the other hand, constitutional judges are also "people of blood and meat," with their own interests, needs; with their own motives, desires and fears; with their own reason and feelings; with their own political and ideological positions, etc. There is no person who is politically absolutely neutral. Every person has, more or less, sympathies for certain political and ideological views and directions (Gicquel, Giucquel J –E., 2023).. Someone is left-wing oriented, someone right-wing; someone prefers socialism, someone capitalism; someone is for democracy, another for a "firm hand." Therefore, from constitutional judges, in conditions of turbulent environment, one cannot expect absolute impartiality towards one or another holder of political power in society. Bias is an emotional category. People, in addition to reason, also have emotions. But when deciding on legal matters, emotions should be completely excluded. The judge or any legal decision-maker should rely on the cold common sense that Thomas Paine writes about, and the essence of which is explained by the Greek and Roman Stoics, as well as Spinoza in the fifth book of his Ethics.

## **3. THE PROFILE OF A CONSTITUTIONAL JUDGE - A PROMINENT LAWYER**

In connection with the above, the question arises about the meaning of the term "prominent lawyer" in the function of a judge of the Constitutional Court. The Constitution, in Article 109, paragraph 4, stipulates that judges of the Constitutional Court are elected from the ranks of “outstanding member of the legal profession” - prominent lawyers. It also stipulates the same for members of the Republic Judicial Council. However, neither the Constitution,

nor any law defines the term "prominent lawyer." Not only is there no definition for this term, but there is no more precise explanation in the Constitution and laws of the Republic.

That is why the majority of constitutional law professors and experts on the constitutional judiciary are against this construction and they propose appropriate amendments that would aim to enable the election of judges who will have high integrity and greater experience and quality of work, or a more precise explanation of this term.

According to some of them, the education of judges provides them with intellectual independence. This implies a good knowledge of the Constitution, on the one hand, and a good knowledge of human rights and international law, especially European law. Such education is particularly important in interpreting the Constitution and interpreting laws and other regulations in the performance of the tasks within the competence of the Constitutional Court. Intellectual independence is the basis for the integrity of a judge. Without it, there is no integrity, and without integrity, there is no independent constitutional judge (Gicquel, Giucquel J –E., 2023),.

When it comes to education, neither the Constitution nor the Act of Procedure of the Constitutional Court prescribes more detailed criteria regarding the education of judges of the Constitutional Court. They are satisfied with the term "prominent lawyer". So, in terms of education, a judge of the Constitutional Court should have a law degree and be distinguished.

The biographies of the constitutional judges of the current composition of the Court show that all judges are law graduates. Of these, two have only passed the bar exam, two have passed the bar exam and a master's degree, three have not passed the bar exam and have a doctorate of science, two of whom are university professors, and one has passed the bar exam, a doctorate of science and a university professor. One judge's position is not filled.

In addition, the criteria for the selection of judges in the Court do not require them to have completed training organized by the Academy of Judges and Prosecutors, which, among other things, has a program that covers international law, more specifically EU law and focuses in particular on the European Convention on Human Rights. A lawyer who does not know or does not know enough about European law has a limited ability to apply the case law of the European Court of Human Rights and other international courts. In the practice of constitutional justice, it is customary when electing constitutional judges, in addition to education, to take into account experience in the judicial system, as well as success in issuing well-composed and well-reasoned judgments. In Macedonia, as stated above, the election of judges is carried out from the ranks of so-called "prominent lawyers." – a term that, as we have already stated above, is not precisely defined.

For its more precise definition, we will start from the semantic meaning of the term "prominent." This term denotes a being in objective reality (person, object, animal, plant, etc.) that according to some characteristic (size, beauty, goodness, diligence, etc.) stands above other, related beings; stands out in relation to them, stands out above them, surpasses them, etc.

The prominent lawyer with his desired legal qualities stands above the majority of other lawyers. With his knowledge, culture, morality, eloquence, he surpasses other lawyers just as a high mountain peak surpasses the peaks of numerous smaller mountains, hills and mounds in its surroundings. He is "visible", recognizable in the public. The public wants to hear his word. And he, personally, wants to be heard. He appears on the media (television, radio, press, internet portals, etc.). He gladly responds to their invitations to give a statement or participate in an open broadcast. He participates in professional and scientific conferences, forums, round tables. He writes scientific and professional papers. He is known not only by the professional, but also by the wider public. There is no prominent lawyer - constitutional judge who is not known, not only to the wider public, but also to the narrower legal community in the country. An anonymous constitutional judge is the dialectical opposite of the prominent lawyer - constitutional judge.

Of the existing judges of the Constitutional Court, only two, before being elected as a judge, are known to the wider public, one of whom is mainly due to his previous political engagement. Both are university professors.

The constitutional judge - a prominent lawyer, in addition to having excellent knowledge of law, especially constitutional law, also knows political science, sociology (general and legal), philosophy of law, psychology, ethics, ethnology, anthropology, etc. In addition to the Macedonian literary language, which he should use perfectly and whose spelling he should also use perfectly, he should know, at least, one of the most widely used world languages (primarily English, and then French, Russian, German, etc.). Solid knowledge of at least one of these languages will enable him to follow professional literature in them, to publish papers in them, to participate on an equal footing with colleagues from other countries in professional and scientific conferences, to exchange views, opinions and ideas. Without such an exchange, he cannot ascend to the pedestal of a prominent lawyer.

The constitutional judge, a prominent lawyer, is not afraid of the pressures and threats of the holders of political power and authority. As the philosopher-king Marcus Aurelius would say, he stands before them "like a rock – a solid stone against which the waves of the sea are constantly breaking". Finally, if due to unbearable pressures and threats he is forced to resign, he will submit it bravely because he knows that a university chair at one of the

domestic or foreign universities awaits him, a position as a scientific advisor in one of the scientific institutes, a well-paid job in one of the institutions of the European Union or, in the extreme case, a law office of a respected and authoritative lawyer - a lawyer with a large clientele. His removal from the Constitutional Court will bring him many positive points in his professional biography as well as in the eyes of the objective scientific and fair-minded civil public.

These conditions that a constitutional judge - a prominent lawyer should meet basically coincide with the generally accepted international standards for defining the term prominent lawyer. In comparative constitutional law, a definition of this term that most closely approximates these standards is given in the Law on the Constitutional Court of the Republic of Montenegro.

According to this law (Article 9, paragraph 2), “prominent lawyers are considered to be professors of law, judges, state prosecutors, attorneys, notaries, lawyers working in state bodies, state administration bodies and local self-government, i.e. local government, as well as lawyers working in commercial companies and legal entities who enjoy professional and personal reputation.”

This definition could serve as a closer explanation of the term “prominent lawyer” in accordance with the generally known international standards for a constitutional judge – a prominent lawyer. Its drawback is the insufficient specificity of the terms “professional and personal” reputation from the perspective of the environment – the environment in which that reputation is enjoyed. Professional reputation can be enjoyed in a narrower or wider environment, i.e. a circle of people (one court, one city, one municipality, in the state as a whole, i.e. among all its citizens, etc.) The wider that environment is, the greater the significance of the reputation is. If the environment is a state, i.e., in our case the Republic of North Macedonia, as a whole or, better said, its citizens, then that reputation is the highest. It will be even higher if the lawyer enjoys professional and personal reputation outside the territory of the Republic; for example: a judge in an international court or a lawyer in an international institution. Given the fact that the number of lawyers who enjoy professional and personal reputation outside the Republic is small, for the definition of the term „prominent lawyer“, according to the model of the Law on the Constitutional Court of Montenegro, we could be satisfied if the lawyer enjoys such a reputation among the citizens of the Republic of North Macedonia, if as a top expert in law and with top personal reputation and dignity he is known to the entire Macedonian civil public in whose service he will work as a judge of the Constitutional Court, performing the most responsible and morally and axiologically highest duties of a protector of constitutionality and legality and of the freedoms and rights of man and citizen established by the Constitution of the Republic. Accordingly, a constitutional judge can be a lawyer who, in accordance with generally accepted international standards for prominent lawyer, enjoys professional and personal reputation among the citizens of the Republic of North Macedonia (Risteski, 2020).

#### **4. OTHER FACTORS OF IMPORTANCE FOR THE INDEPENDENCE OF THE JUDGES OF THE CONSTITUTIONAL COURT**

Institutions are made up of the people who work in them. There is no better institution than the people who make it up. There is no better constitutional court than the judges in its composition. In this regard, the true role of the Constitutional Court in protecting constitutionality and legality in the Republic of North Macedonia does not depend only on the legal effect of its decisions. Its role essentially depends on the ability of constitutional judges to make decisions based on a developed awareness of the character and further development of the constitutional order towards the achievement of its goals, on their courage to insert the rule of law as a framework within which the state authorities will act in the exercise of their powers established by the Constitution and laws, and on their readiness to protect the Constitution of the Republic, not only from formal violations, but also from all forms of factual changes to the constitutional provisions. Such judges will correctly and comprehensively interpret the Constitution from several aspects: legal, ontological, teleological, axiological, ethical, etc (Risteski, 2020).

From the perspective of career guidance, a prominent lawyer, before being elected as a judge of the Constitutional Court, should have passed all the stages in the legal field in which he previously worked. Thus, for example, if it is a question of electing a constitutional judge from among the judges, for which the Republic Judicial Council actually makes a proposal, the candidate must not skip the appellate courts and Supreme Court. It is inadmissible for a judge of a basic court to go to the position of judge of the Constitutional Court.

A constitutional judge from the ranks of the administration must not skip the cases of first-instance and second-instance administrative procedure, then the position of judge of the Administrative Court and the Higher Administrative Court, in order to finally, at the end of his working life, come to the position of judge of the Constitutional Court. Only in this way will he gain top experience in the legal profession. Experience supplemented with broad theoretical knowledge and experience in scientific and professional work will produce a prominent lawyer in the true sense of the word.

The position of judge of the Constitutional Court is the pinnacle of a lawyer's career. From that pinnacle, after the expiration of his term, he should go into a well-deserved retirement with full pensionable service. If a younger lawyer is elected as a judge of the Court who, after the expiration of his term, must return to the ranks of the legal profession outside the Court, there is a danger that he will "appease" the holders of political authority and power in order to secure him a secure and well-paid position in one of the state bodies and institutions or another position for which an "exception" is required on their part. This will put him in a situation where he is dependent on them, and a dependent constitutional judge is not a good protector of constitutionality and legality.

##### **5. NON/OBEYING CONSTITUTIONAL JUDGES – NON/OBEYING CONSTITUTIONAL COURT**

There is no official evidence that one or more judges of the Constitutional Court acted on an "order" from the ruling party. Such a thing is impossible to prove, because no judge will openly say that he acted according to the will of the government. Unfortunately, some facts point to indications of such action, as well as to courting the government and avoiding objections from it. The latest case is the tactic of the Constitutional Court in connection with the assessment of the constitutionality of Article 2 of the Law on Amendments to the Law on Pension and Disability Insurance. The court waited for the law to expire and then decide and stop the procedure for assessing its constitutionality for that reason. Thus, the so-called linear adjustment of pensions remains in force. In contrast, in relation to the assessment of the constitutionality of the Law on Solidarity Tax, the Court did not stop the procedure, but annulled the law even though its validity had expired. With such a decision, the court enabled the solidarity tax to be returned to the wealthy from the funds of the Budget of the Republic. Speaking of tactics, it is not out of place to mention the failure to act on the initiative to assess the constitutionality of the Law on Amendments and Supplements to the Criminal Code and the "passing the ball" to the Parliament, so that it finally brought new amendments according to the "yardstick" of the ruling coalition. Then comes the Court's decision to halt the procedure for assessing the constitutionality of Articles 1 and 3 of the Law on Amendments to the Law on Pension and Disability Insurance ("Official Gazette of the Republic of Macedonia," No. 75/25), which deny the right to adjust (increase) the pensions of 12 thousand pensioners whose pensions are paid abroad) with the unacceptable explanation that they were not in the same legal and factual position as pensioners whose pensions are paid in the country. In this regard, it is noteworthy that the Constitutional Court decided in February 2024 not to initiate a procedure for assessing the constitutionality of the provisions of Article 368 of the Law on Amendments to the Law on Obligations regarding the payment of time-barred claims, to change its decision only a few months later, immediately after the change of government, and initiate a procedure, contrary to the principle *Non bis in idem*.

Professor Škarić, who is considered an undoubted authority on constitutional law and the authors of the Analysis of the Helsinki Committee for Human Rights on the Constitutional Court in the Conflict between Political Interests and Human Rights, cite other examples of the majority of judges of the Constitutional Court "play as the government plays," from a somewhat older date (Škarić, 2014, Stojanovski and oth., 2016). All these examples, in the absence of *ex officio* evidence of the actions of the constitutional judges and thus of the Constitutional Court to which they belong, at the will of the ruling party, speak more than indications that the Court is not clean on the issue of impartiality towards the ruling party, which is unacceptable when it comes to judges who are prominent lawyers in the true sense of the word.

##### **6. CONCLUSION**

The Constitutional Court is an institution of the constitutional order of the Republic of North Macedonia. Its primary competence is the protection of constitutionality and legality. It is a *sui generis* institution. Formally and legally it is independent of the three branches of government: the legislative, the executive and the judicial. There is no one above the Constitutional Court except the Constitution, which the Court should protect from violations and, by protecting it, ensure the rule of law as a fundamental value of the constitutional order of the Republic of North Macedonia and the establishment of justice as the highest value in social relations. Only in this way will it serve the citizens as bearers of sovereignty in the Republic.

In modern democracies, the complete absence of politics around constitutional courts is practically non-existent, as they decide on issues of the highest importance for the state. A key question is whether political influence is limited and indirect or so strong that it undermines the independence of the court and reduces its effectiveness in protecting constitutionality and legality.

The basis of the efficiency of each constitutional court is its functionality. There is no efficiency without functionality. The constitutional court cannot be functional if it is dependent on the holders of authority and power in society. The dialectical opposite of non-independence is dependence.

In the Republic of North Macedonia, the opinions of the scientific and broader civil public are divided. Some believe that the Court is often influenced by daily politics, while others believe that, despite its weaknesses, it still

represents an important mechanism of constitutional control over the implementation of constitutionality and legality in the Republic.

The Constitution of the Republic of North Macedonia formally and legally provides the Court with a high degree of functional independence; but, unfortunately, only formally and legally. The high degree of discrepancy between the normative and the factual in Macedonian society has also made its mark here. The Constitutional Court is dependent on the holders of authority and power in society. This is supported, above all, by the election of the judges of the Court regulated by the provisions of the Constitution of the Republic

According to the Constitution, the judges of the Constitutional Court are elected from among the prominent lawyers. But in practice that is not the case. Prominent lawyers are those members of the legal profession who, with their knowledge, experience, morality and dignity, surpass other lawyers and who, due to their qualities, are known to the broad civil public. A small number of constitutional judges can bear the epithet “prominent lawyer”. A prominent lawyer or “outstanding member of the legal profession,” as the constitution says, is courageous and powerful. As such, he does not succumb to the pressures of the holders of authority and power in society. His courage and power rely on his high theoretical and practical (experiential) knowledge, on his reputation and dignity as values of the citizen’s personality guaranteed by the Constitution (Article 25).

In contrast, a lawyer who is not prominent is prone to "bending his back" and obedience to those in power and authority. Such lawyers - constitutional judges do not provide the Constitutional Court with functional power in protecting constitutionality and legality. The Constitutional Court can be an efficient service to citizens for the protection of constitutionality and legality in the Republic only with judges who are prominent lawyers in the true sense of the word.

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