When Constitutional Court Steps In: Rethinking Constitutionalism Through Judicial Activism. Case Study of the Republic of North Macedonia

Professor **Jelena TRAJKOVSKA-HRISTOVSKA**[1]

Abstract

Constitutional activism has played a significant role in advancing the interpretation and evolution of law. However, when judges begin to believe they can address all societal issues by stepping into legislative and executive roles- often due to a perception that these branches have fallen short in their duties- numerous challenges inevitably emerge. The paper will examine the dynamic interplay between constitutional (judicial) activism of constitutional courts and constitutionalism, analyzing how constitutional courts navigate their role within modern constitutional democracies. The paper will focus on mechanisms and instruments that fuel judicial activism, within the legal framework of Republic of North Macedonia. The paper explores whether certain elements embedded in the legal framework of the Constitutional Court might, over time, create conditions that disturb the balance between the branches of power. It considers the possibility that the Court — despite being traditionally seen as the weakest link in the separation of powers — could gradually take on a more dominant role in the constitutional structure. The analysis also reflects on whether the system has sufficient mechanisms in place to respond to such developments. The research relies on comparative and doctrinal methods, combining an interpretation of constitutional provisions with a contextual analysis of court practice and legal scholarship. This approach is commonly used in constitutional law to assess the evolution of institutional roles and to draw parallels across jurisdictions. The analysis of instruments that foster judicial activism, will provide insights into the evolving role of the Constitutional court of Republic of North Macedonia in reinforcing or challenging the foundational structures of governance.

Keywords: *Constitutional court, constitutionalism, separation of powers, instruments for judicial activism, normative framework.*

JEL Classification: K10, K38

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[1] Jelena Trajkovska-Hristovska - Department of Constitutional Law and Political System, Faculty of Law „Iustinianus Primus", „Ss. Cyril and Methodius University", Skopje, Republic of North Macedonia, ORCID: 0000-0001-7229-6590, j.trajkovskahristovska@pf.ukim.edu.mk.

1. Introduction. Contextualizing Constitutional Activism in Modern Democracies

Contemporary constitutional democracies are marked by a significant transformation in the traditional understanding of the separation of powers. In this new constitutional reality, the judiciary — particularly constitutional courts — is no longer confined to its classical role of interpreting and applying the law. Instead, courts are increasingly perceived and even expected to act as institutional correctives, stepping into the political arena when the legislative and executive branches are seen as inactive, ineffective, or failing to uphold constitutional values. This shift has given rise to what constitutional theory terms *constitutional activism* — a phenomenon that reflects institutional rebalancing the role of the judiciary in a functioning democratic state.

The phenomenon of constitutional activism can be seen as both a legal necessity and a pragmatic response to the challenges of modern governance. In situations of legislative deadlock, institutional dysfunction, or urgent social transformation, courts have stepped in to articulate legal standards and even influence policy direction. Such interventions, however, raise important constitutional questions. The expanded role of the judiciary has generated concern regarding its compatibility with the principle of the separation of powers and has triggered extensive academic discussion on the limits and legitimacy of this form of judicial engagement.

Constitutional activism, therefore, presents a complex picture. On the one hand, it may serve as a safeguard against institutional failure; on the other, it raises concerns about judicial overreach. The tension lies in whether this type of judicial behavior should be regarded as a necessary adaptation to political shortcomings or as a potential challenge to the principle of democratic legitimacy. In this context, questions arise about whether activism strengthens the rule of law or disrupts the foundational balance among the branches of government.

These questions are not merely theoretical — they lie at the core of current constitutional debates in both established and emerging democracies. As the role of courts expands, so too does the concern about whether such a role is democratically legitimate. The increasing involvement of courts in areas traditionally reserved for representative bodies raises the following critical issues: *Is judicial supremacy — understood as the power of courts to act as final arbiters of constitutional meaning — compatible with the principle of separation of powers? Can a constitutional system remain democratically grounded if unelected judges possess the authority to invalidate decisions made by democratically elected legislators (A. Bickel`s counter-majoritarian difficulty)? Is judicial review the most appropriate mechanism for safeguarding the Constitution, or should it be supplemented by other institutional or civic checks? And, more fundamentally, is it ac-*

ceptable that the public has minimal direct influence over processes that determine the validity of laws, enacted in their name?

The consolidation of judicial supremacy into a stable, widely recognized practice within constitutional legal theory has not resolved the core concern: judicial supremacy places significant power in the hands of judges who are not elected by, nor directly accountable to, the citizenry. What modern constitutional theory no longer disputes is not merely the emergence, but the institutionalization and even normalization of practices whereby constitutional courts extend their reach into the domain of the legislature, act in effect as a "third chamber" of parliament, and assume a proactive role in directing the normative and political trajectory of state institutions.

This phenomenon is reflected in the academic use of a range of terms — *judicial supremacy*, *judicial activism*, *judicial paramountcy*, *even judicial imperialism* — which, despite their nuances, all denote the same underlying concern: a departure from the classical understanding of the separation of powers and from the mutual constraints among state organs, that traditionally underpin constitutional democracies. Courts, in this new model, no longer merely interpret the law — they shape it and redefine its boundaries. In certain cases, they even create their own rules, which grant them powers beyond those ordinarily provided, enabling them to actively employ the instruments of judicial activism.

Justifications for this expansive judicial role typically rest on three principal assumptions. *First*, that the court is the ultimate guardian of the constitution, uniquely positioned to prevent the erosion of constitutional values. *Second*, that judicial independence from political actors ensures impartiality and protects minority rights from the potential tyranny of the majority. *Third*, that courts act as defenders of fundamental rights and freedoms, particularly when legislative compromises or executive actions threaten to violate them. These assumptions have become central to the legitimization of constitutional activism, especially in systems where other branches of power are perceived as weak, partisan, or inefficient.

Nonetheless, the reliance on judicial intervention as a substitute for political resolution poses its own risks. The question arises whether a constitutional democracy can sustain long-term legitimacy if its foundational decisions are increasingly driven by institutions that lack direct democratic accountability. Critics argue that this shift undermines the notion of self-government and elevates a technocratic elite over the will of the people.

In any case, the rise of constitutional activism requires a careful and critical examination of the legal and institutional frameworks. The issue is not whether courts should play a role in defending constitutional values — few would dispute that they must — but rather how far that role can and should extend. The balance between judicial intervention and democratic governance remains one of the most challenging questions facing modern constitutional theory. It demands a

nuanced approach that neither idealizes the judiciary nor dismisses its role as an essential safeguard within the constitutional system. Instead, it calls for a rethinking of the principles of constitutionalism in light of the realities of judicial power and its implications for democratic legitimacy[2].

Finally, to frame the discussion within a clear analytical structure, the analysis in this paper is guided by the central research question: To what extent does the normative framework of the Constitutional Court of the Republic of North Macedonia enable or constrain the development of judicial activism, and what are the broader implications for constitutionalism and democratic legitimacy? The hypothesis proposed is that the existing institutional and legal design, marked by procedural flexibility, lack of external oversight, and broad interpretative discretion, facilitates a judicial practice that increasingly resembles constitutional activism. The objective of the paper is to critically examine how the institutional and procedural design of the Constitutional Court of the Republic of North Macedonia facilitates forms of judicial activism, and to assess its impact on the separation of powers and democratic accountability. The analysis of this paper relies on a doctrinal and comparative legal method, combining legal interpretation with comparative references to constitutional courts in similar jurisdictions. This methodology allows for a contextualized assessment of the Macedonian case within broader constitutional trends.

2. Judicial Activism and the Constitutional Court of the Republic of North Macedonia

2.1. The Legal Framework of the Constitutional Court

The system of constitutional review in the Republic of North Macedonia traces its origins back nearly five decades. The inaugural Constitutional Court of the Socialist Republic of Macedonia was established in 1963, at a time when the prevailing model of governance was based on the unity of powers. Despite operating within such a framework, legal scholarship acknowledges that the creation of a Constitutional Court during this period marked a significant constitutional innovation and institutional advancement. Unlike states that adopted models in which the legislature exercised self-review over constitutionality, Socialist Macedonia took a different path: with the 1963 Constitution, it introduced its first institutional "guardian of constitutionality and legality".

The 1991 Constitution of the Republic of Macedonia, by introducing the

[2] Renata Deskoska, Jelena Trajkovska-Hristovska (2024). „The Interplay of Sustainability, Constitutionalism and Legitimacy: Examining the "Political Ecotopia" as a manifestation of Social Sustainability and a Pillar of Constitutionalism", *Juridical Tribune – Review of Comparative and International Law* 14, no. 4: 670-673, DOI: 10.62768/TBJ/2024/14/4/09.

principle of separation of powers, created the necessary preconditions for constituting the Constitutional Court. The Constitutional Court is *materia constitutionis*, but not *materia legis*. The provisions relating to the Court are found in Part IV of the Constitution. From these provisions, it is evident that the Constitutional Court of the Republic of North Macedonia is an institution separate from the judicial system, tasked with "protecting constitutionality and legality.[3]" The constitutional provisions concerning the Court (Articles 108–113) are modest and general. Although the initial impression is that the "founding fathers" of the Macedonian Constitution were inspired by the idea of creating an institution that would serve as the guardian of constitutionality, the constitutional framework gives the impression that the "founding fathers" remained somewhat unexpressed. The constitutional provisions on the status, composition, jurisdiction, and types and effects of the Court's decisions are few and overly general.

Furthermore, Article 113 of the Constitution, which states that "the manner of work and the procedure before the Court shall be regulated by an act of the Court,"[4] gives the impression that the constituent power deliberately excluded the possibility of regulating matters related to the Constitutional Court through a Law on the Constitutional Court. It can be assumed that the guiding idea behind this unfortunate constitutional solution was to secure greater independence and autonomy of this institution within the system of governance. Deskoska's observation — that the ability of constitutional judges to decide on important matters concerning their own status is unacceptable and may lead to a violation of the principle of "checks and balances"[5] — illustrates an application of Bickel's theory of the counter-majoritarian difficulty to the case study of North Macedonia.

The absence of a law regulating the Constitutional Court raises questions not only regarding the legal basis of constitutional review but, more importantly, concerning the source of the Court's legitimacy. There is no system of constitutional review in which the court is entrusted with such a function, without its status, organization, and jurisdiction being regulated by law. In addition to the constitution, legislation is the second source that should more precisely regulate these issues. The fact that this matter is regulated by law, adopted by the legislature, is not perceived in contemporary constitutional literature as a threat to the independence and autonomy of the Court in a system based on the principle of

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[3] Constitution of Republic of Macedonia adopted 1991, Art. 108.

[4] Constitution of Republic of Macedonia adopted 1991, Art. 113.

[5] Kenneth D. Ward, Cecilia R. Castillo (eds.) (2005) *The Judiciary and American Democracy: Alexander Bickel, the Countermajoritarian Difficulty, and Contemporary Constitutional Theory*. State University of New York Press, http://www.jstor.org/stable/jj.18254474; Renata Treneska - Deskoska (2006). *Constitutionalism and Human rights,* Skopje, p. 273; Ádám Auer, Gábor Németh, Endre Orbán, Péter Pollner (2024), „Constitutional Court Decisions as a Network of Precedents? A Network Theory-Based Analysis of the Jurisprudence of the Constitutional Court of Hungary". *Juridical Tribune - Review of Comparative and International Law,* Volume 14, Issue 4: 652-669, DOI: 10.62768/TBJ/2024/14/4/08.

separation of powers.

By excluding the possibility of regulating the Constitutional Court through law, the Macedonian constitution maker, seems to have made a radical extension of the demand to isolate the Court from legislative influence. In doing so, the Constitution created a legal gap, left to be filled by an act that is hierarchically below the law, thereby indirectly placing the Constitutional Court in the role of a norm-maker.

The position of the Constitutional Court in the system of governance in the Republic of North Macedonia is determined through the following:

- *The independent status of Constitutional Court judges*. The 1991 Constitution of the Republic of Macedonia provides that the mandate of Constitutional Court judges is nine years, without the possibility of reappointment. According to Article 111, paragraph 4, the judge's term may be terminated before its expiry only if: 1) the judge resigns; 2) is convicted of a criminal offense and sentenced to an unconditional prison term of at least six months; or 3) permanently loses the ability to perform the function, as determined by the Court itself. This constitutional provision, allowing removal only under strictly defined conditions, serves as a powerful guarantee of the independence of constitutional judges[6]. "Beyond these specified reasons, there is no possibility for the early removal of a constitutional judge," and these conditions are determined exclusively by the Constitutional Court[7]. The conditions for early termination of the judicial function are determined by the Constitutional Court itself, and not by any other state body. This constitutional provision serves as a particularly strong guarantee of the status of constitutional judges within the system of governance.

- *Incompatibility provisions*. A Constitutional Court judge may not hold any other public office, engage in any other profession, or be a member of a political party[8]. It can be assumed that the main motivation for this provision was to ensure impartial and professional performance, as well as full dedication to the role of judge. In contrast to this absolute incompatibility, the Court's position from September 1997 emphasizes that serving as a university lecturer does not violate the incompatibility rule[9]. This serves as an example of judicial interpretive maneuvering, indicating the Court's potential and readiness to use available legal tools in practicing judicial activism.

- *Judicial immunity*. Article 111, paragraph 2 of the 1991 Constitution establishes that Constitutional Court judges enjoy immunity, with the Court itself deciding on its application. Interestingly, it is not the Constitution but the Court's internal Rules of Procedure that define the scope of immunity. Article 94 of the

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[6] Savo Klimovski, Renata Deskoska, Jovanovska Tanja Tanja (2012), *Constitutional Law.* Prosvetno delo. Skopje 2012. p. 506.

[7] Skaric Svetomir, Siljanovska-Davkova Gordana. *Constitutional Law.* Skopje 2007, p. 746.

[8] Constitution of Republic of Macedonia adopted in 1991 Art. 111/1.

[9] Svetomir Skaric, Gordana Siljanovska-Davkova, *op. cit.,* p. 770.

Court's Act stipulates that judges enjoy immunity identical to that of Members of Parliament. According to this provision, a judge cannot be held criminally liable or detained for opinions expressed or votes cast in the Court. Furthermore, a judge cannot be detained without the Court's consent, except when caught committing a crime punishable by at least five years in prison. The Court may also apply immunity even when a judge does not invoke it, if necessary for performing their function. Equating judicial immunity with parliamentary immunity reflects a legacy of the previous system. This procedural solution represents a clear overstepping of the judges' powers, as immunity is a matter of constitutional and statutory regulation, and the Constitution does not authorize its regulation through internal rules.

- *Qualifications required*. Article 109, paragraph 4 of the Constitution provides that Constitutional Court judges shall be selected from among distinguished legal professionals. Given North Macedonia's experience with this provision, the question arises whether it is overly general and vague. In this context, Siljanovska emphasizes that "the question of *who* is appointed as a constitutional judge may be more important than *how* they are appointed.[10]" Deskoska also stresses that the Constitutional Court must be an independent and autonomous institution — not a mere "decoration" within the constitutional system, but a genuine guardian of the "spirit" of the Constitution and of individual rights[11]. This can only be achieved if the Court defends its integrity through reasoned, elaborate, and convincing decisions[12]. Ultimately, the qualifications of the judges directly impact this capacity.

2.2. Instruments Enabling Judicial Activism in Practice

Judicial activism often arises through the broad and creative interpretation of constitutional and legal provisions, which, although formally grounded in the constitutional framework, can be employed in ways that extend judicial authority beyond its traditionally conceived limits. These provisions — particularly those that are vague, abstract, or open-ended — offer courts interpretive space to justify involvement in politically sensitive or structurally complex matters.

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[10] Gordana Siljanovska-Davkova (2010). *The Constitutional Court of Republic of Macedonia from my Perspective. FORUM EUROPAENUM – Constitutional Court of Republic of Macedonia- Status, Dilemmas, and Perspectives*/*Уставниот суд на Република Македонија - од мој агол*. Силјановска-Давкова Гордана. FORUM EUROPAEUM - Уставниот суд на Република Македонија-статус дилеми и перспективи. Skopje, p. 17.

[11] Renata Deskoska (2010), *The Constitutional Court of Republic of Macedonia-Dilemmas and Perspectives*. FORUM EUROPAEUM -– Constitutional Court of Republic of Macedonia- Status, Dilemmas, and Perspectives / *Уставниот суд на Република Македонија-дилеми и перспективи.* Дескоска Рената. FORUM EUROPAEUM - Уставниот суд на Република Македонија-статус дилеми и перспективи. Skopje, p. 34

[12] Ibid, p. 34.

Through such interpretive flexibility, courts may reinterpret their constitutional role, positioning themselves not only as arbiters of legality but as active guardians of democratic integrity and constitutional values. In doing so, they may intervene in policy areas or institutional questions that would typically fall under the competence of the legislature or executive. This occurs especially in contexts where other branches are perceived as inactive, ineffective, or in violation of constitutional principles — thus providing judicial bodies with a justification to "fill the gap."

However, this practice raises important concerns. When courts invoke broad constitutional principles to issue far-reaching rulings without clear textual mandates, they may be seen as appropriating a quasi-legislative function. This blurs the lines of separation of powers, as courts begin to shape public policy or institutional arrangements in ways that may not be democratically accountable. Critics argue that such activism, while often motivated by a commitment to justice or human rights, can undermine constitutionalism if it results in the concentration of power in unelected judicial bodies at the expense of representative institutions. The challenge, therefore, lies in balancing the need for constitutional oversight with respect for democratic legitimacy and institutional boundaries.

While judicial activism is commonly perceived as a phenomenon characterized by broad and creative interpretation of legal norms, often bordering on exceeding the limits of the normative framework in order to "breathe life" into the law, such an understanding captures only part of its complexity.

In reality, many legal systems and normative frameworks already contain embedded instruments and mechanisms that enable courts to engage in active interpretation and application of the law without necessarily departing from the formal boundaries of legality. Courts often skillfully invoke and utilize these tools, thereby influencing legal and constitutional development in a manner that remains institutionally grounded yet substantively transformative. This paper seeks to examine and delineate the ways in which the established constitutional framework and the structured legal system of the Republic of North Macedonia contribute to fostering judicial activism.

2.2.1. No Law, More Power? Judicial Activism in the Absence of a Law on Constitutional Court

In a more detailed analysis of the normative framework regulating the Constitutional Court, one cannot overlook the absence of a dedicated Law on the Constitutional Court. Specifically, the constitutional provision in Article 113 defines the legal regulation concerning the Court exclusively as *materia constitutionis*, excluding the possibility for this matter to be regulated by law. Unfortunately, the constitutional norm stipulating that “the manner of work and the procedure of the Court are regulated by the Constitution and an act of the Court”

strictly limits the legislator from further elaborating this crucial constitutional matter through statute, contrary to how it is handled in all modern democratic systems. Can we conclude that this was a case of deliberate constitutional minimalism introduced by the founding fathers, or merely an oversight, a failure to anticipate the far-reaching consequences of this unfortunate constitutional choice?

Thirty-three years after the adoption of the 1991 Constitution, and despite numerous criticisms of this provision, it remains unchanged. The motives behind its inclusion in the Constitution can only be speculated. It is likely that the constitutional drafters, drawing from previous experience regarding the position of the Constitutional Court within the former federal state of the SFRY, aimed to strengthen the constitutional standing of this institution and insulate it from legislative dominance. It seems this initial premise was developed to its extreme, whereby the attempt to constitutionally regulate the matter resulted in the complete exclusion of Parliament from the process. It may also be presumed that one of the underlying motives for this highly unusual constitutional solution was the intention to grant the constitutional judges full autonomy in regulating matters concerning the Court itself, thus allowing them to define the institutional setup and role of the Court within the system.

The legal consequences of this constitutional solution became apparent with the adoption of the first Rules of Procedure of the Constitutional Court in 1992, and the various provisions that document offered for regulating what is, in essence, a highly important matter of constitutional and legal relevance. With a duration of 32 years, this first set of Rules of Procedure remains one of the longest-standing documents in the Macedonian legal system, having undergone only minor, primarily technical, amendments. In June 2024, the Constitutional Court of the Republic of North Macedonia adopted a new Rules of Procedure. This new legal document contains even more unconventional provisions, which directly shape the picture of an emerging judicial activism within the system —using the unfortunate constitutional arrangement as a legal foundation, whereby the regulation of the Constitutional Court is grounded in the Constitution and the Court's own internal act.

Among the various legal solutions offered in this document — which, I would argue, represent its *differentia specifica* — the first striking feature is the choice of the document's name. The composition of the Constitutional Court that adopted this document opted for the title *"Act of the Constitutional Court of the Republic of North Macedonia."* The selection of this title, which apparently raised no concern among the judges, introduces additional confusion and terminological inconsistency. Namely, in both the Macedonian language and legal terminology, the term *"act"* is a generic term referring to all kinds of legal documents. Thus, using *Act* as a specific title is misleading. Legal theory does not permit the use of the term *act* to denote a concrete type of document such as a

law, rulebook, decision, or court ruling. All of these documents fall under the broader category of *acts*, but each has its distinct designation: *Law* (in English: law, act), *Rules of Procedure*, *Decision*, *Ruling*, *Rulebook*, *Regulation*. All are legal acts, but none is titled simply *Act*.

This terminological inconsistency likely stems from a literal reading of the constitutional provision: "the manner of work and the procedure of the Court shall be regulated by the Constitution and an ACT of the Court." The problem becomes especially apparent when one tries to classify the types of acts (decisions and rulings) adopted by the Constitutional Court. The same term is used for all, necessitating further clarification regarding the exact nature of the document — whether it refers to the Court's Rules of Procedure or a decision adopted in the exercise of its constitutional powers.

The use of the term functions as a clear affirmation of the argument, because when one refers to the *Act of the Constitutional Court* in the context of the Macedonian legal system, any legal interlocutor would understandably assume that it refers to an organic or systemic act of the Court (i.e., a law-like document) — not, as is actually the case, its Rules of Procedure, which in other democratic systems are adopted independently by the Court. This assumption is misleading, particularly since there is no Law on the Constitutional Court in our system.

The remaining provisions in the new Rules of Procedure that further expand the Court's capacity for judicial activism will be analyzed in greater detail in the subsequent sections of this paper. Perhaps it is worth briefly noting the unusual statement made by the newly elected President of the Court. Namely, on the day of his election — following a tense and drawn-out session with multiple rounds of voting — he publicly declared that during his mandate, the Constitutional Court would become an active player in the system and would pursue judicial activism[13]. In the context of a broadly defined constitutional framework regulating the Court's position within the legal system, and in the absence of a specific law on the Constitutional Court, this statement raises the important question: *How should such a declaration be interpreted?*

2.2.2. Institutional Overreach through Internal Rulemaking: A Subtle Form of Judicial Activism

While rules of procedure are generally intended to regulate the internal functioning and procedural aspects of a constitutional court, there are instances where such internal acts venture into the domain of substantive law.

In principle, matters like rights, duties, and status of the judges of the

[13] https://ustavensud.mk/%D0%BC%D0%BA/%D0%BF%D1%80%D0%B5%D1%81-%D0%BA%D0%BE%D0%BD%D1%84%D0%B5%D1%80%D0%B5%D0%BD%D1%86%D0%B8%D0%B8, accessed on 15.05.2025.

Constitutional Court, procedures performed by the Court, are *materia constitutionis issues*, and as such should be regulated either directly by the Constitution or by Law/Act for Constitutional Court, enacted by the Parliament. If a constitutional court attempts to regulate such matters through its internal procedural rules — without explicit constitutional or statutory authorization — this may be viewed as an overextension of its regulatory authority.

Such actions reflect a more nuanced form of judicial activism, which may be termed *institutional* or *regulatory activism*. In these cases, the court does not engage in activism solely through its interpretative judgments, but rather by filling normative gaps through instruments that were not originally intended for substantive regulation. This practice enables the court to shape legal reality without undergoing the standard legislative or constitutional amendment process, thereby expanding its institutional influence beyond adjudication.

In the case of the Constitutional Court of the Republic of North Macedonia, the Constitution provides only a limited and principled framework for the functioning of the Court, outlining merely the basic structure and competences. What the constitutional drafters failed to foresee were the legal consequences of such a sparse regulation. In the absence of a legal basis for regulating certain substantive matters by act for Constitutional court, the Constitutional Court has found itself as the only institution capable of addressing and resolving these gaps — often through its own procedural act, the so-called "Rules of Procedure" (now the "Act of the Constitutional Court").

By necessity, this internal procedural act has gradually assumed a constitutive function, regulating matters such as judicial immunity, the legal effect and enforcement of decisions, the conditions under which citizens may seek constitutional protection, and even the rights, duties, status of the judges, and financial autonomy of the Court. These are clearly not procedural questions, but rather institutional and *materia constitutionis* issues, that are ordinarily regulated by constitutional or statutory provisions. The Court, therefore, has been involuntarily but unmistakably thrust into the role of a secondary norm-giver, creating binding norms for fundamental legal issues with no more than a handful of constitutional provisions serving as limits.

What emerges is a situation in which the Constitutional Court — through its internal rulemaking — effectively becomes a quasi-legislative authority, exercising broad normative power under the guise of procedural regulation. The lingering constitutional ambiguity, namely that "The mode of work and the procedure of the Constitutional Court are regulated by an enactment of the Court,[14]" has been expansively interpreted by the Court itself, allowing it to extend its regulatory scope to issues far beyond mere procedural organization.

Ultimately, a problematic implication remains from the realization that

[14] Constitution of Republic of Macedonia adopted in 1991, art 113.

the problem of counter-majoritarian difficulty — or what some authors refer to as a "constitutional deviation" — was not even anticipated at the time the constitutional provisions regarding the Constitutional Court were being drafted.

An additional dilemma arises from the question of whether the few constitutional provisions concerning the Constitutional Court in the Constitution, are sufficient to ensure what Bickel termed the "passive virtue."

2.2.3. Broad Locus Standi

The issue of legal standing is extremely important and goes beyond the boundaries of a purely technical matter. This can be argued through two points:

- The question of active legal standing directly determines how much, de facto, control of the constitutionality of laws and other acts subject to such control will be exercised; and
- The question of active legal standing indirectly affects the efficiency of constitutional courts.

In the procedure for reviewing the constitutionality of legal acts before constitutional courts, it is of particular importance whether the initiators of the procedure are clearly defined entities with active standing stemming from the constitution and constitutional or organic law, or whether they are initiators whose initiative leads the court to decide on the constitutionality of legal acts. Namely, in the context of the aforementioned idea that the initiators of the procedure directly determine the extent to which the constitutional court will act as a "true guardian of the Constitution," the following argument arises: when the court decides upon an initiative, it holds discretionary power to determine whether or not to initiate the procedure for constitutional review. In contrast, if the holders of the right to initiate the procedure are precisely defined, the court is obliged to act upon the specific proposal for constitutional review of the disputed act.

The bodies that may initiate the procedure for constitutional review before constitutional courts are usually defined in the constitution or in (constitutional or organic) laws governing constitutional courts. In the Republic of North Macedonia, this element of the procedure is neither a constitutional nor a statutory matter. Article 23(1) of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia stipulates that "Anyone may submit an initiative for assessing the compliance of laws with the Constitution, the compliance of other regulations and collective agreements with the Constitution and the laws, and the compliance of programs and statutes of political parties and citizens' associations with the Constitution.[15]" Submitting an initiative for the assessment

[15] Act for the Constitutional Court 2024. Art 23(1).

of the constitutionality and legality of legal acts is not connected with the existence of a legal interest of the applicant, nor is it limited by time constraints.

In their decisions related to active standing before the Court, constitutional judges nullify the possibility of precisely identifying the authorized proposers and retain only the provision that "anyone may submit an initiative to initiate proceedings." What does this actually mean?

Judges independently decide on a matter that is *materia constitutionis* and *materia legis*. This justifies the concern that normative solutions leave space for the so-called "judicial paramountcy."

By accepting this solution, no distinction is made between a proposal and an initiative. Constitutional-legal literature and constitutional court practice in constitutional review indicate that the effect of submitting a proposal by an authorized proposer and an initiative by any citizen is not the same. In particular, it is emphasized that direct access to constitutional courts by citizens can be realized either through *actio popularis* or through a *constitutional complaint*. In both cases, it is the constitutional court that decides whether to initiate the procedure. On the other hand, when a proposal is submitted by an entity specifically defined as authorized under the Constitution or law, the constitutional court is obliged to act on it. In such a case, there is no possibility for the court to exercise discretion regarding the initiation of the procedure for constitutional review.

In an attempt to provide broader access and allow more subjects to initiate proceedings, a solution is adopted that reflects a completely different and undesirable extreme. Namely, the radical extension of this requirement leads to a situation where everyone can submit an initiative, but no one can initiate a procedure, because ultimately that decision lies with the Constitutional Court. These provisions of the Rules of Procedure of the Constitutional Court leave room for the manifestation of constitutional judicial *judicracy* and the exercise of instruments related to activist action by the Court. Namely, this enables courts to hear more politically or socially relevant cases.

The aforementioned normative solutions require particular caution in their application. The explanation should be sought in the often-criticized symbiosis of this mechanism with certiorari mechanisms.

Namely, broad Locus Standi, closely resembles the model of *Discretionary Case Selection (Certiorari or Filter Mechanisms),* as seen in systems that apply *certiorari* or filtering mechanisms. In these systems, the court is not bound to examine every case submitted, but instead filters cases based on their constitutional significance, societal impact, or legal complexity. This model may enhance institutional efficiency and judicial focus on fundamental questions, but it also consolidates substantial power in the hands of the court itself. When combined with open-ended standing provisions and *actio popularis* — such as allowing any individual to initiate a procedure — this discretion creates an asymmetrical system in which the volume of possible cases is broad, yet the actual

decision to act is exclusively left to the internal priorities and activist tendencies of the court. This synthesis of broad accessibility and strict filtering underscores a paradox in modern constitutional justice: the more open the door to the court appears, the more selective and strategic the court's own gatekeeping must become.

2.2.4. Suo Motu Jurisdiction - Initiation of Constitutional Review Proceedings by the Constitutional Court Ex Officio

The initiation of proceedings for constitutional review by the Constitutional Court on its own initiative (*ex officio*) can occur in several variations:

1. initiating proceedings for constitutional review whenever the Court deems it necessary;

2. initiating proceedings *ex officio* when the Court extends the scope of constitutional review beyond the submitted proposal; and

3. initiating *ex officio* proceedings when, in the course of reviewing the constitutionality of another legal act, the Court applies a certain law and assesses that there is reasonable ground to question its constitutionality.

The Macedonian model of constitutional review provides for the possibility that the Court may initiate proceedings for constitutional review independently. Specifically, Article 23(4) of the Rules of Procedure of the Constitutional Court stipulates that: "*The Constitutional Court may, on its own initiative, decide to open a case for reviewing the constitutionality of a law, the constitutionality and legality of a regulation or other general act, or the constitutionality of the program and statute of political parties and citizens' associations.*[16]"

This provision ultimately indicates that the Constitutional Court may initiate proceedings for constitutional review whenever it deems necessary.

In addition, the procedural rule provided by the judges is supplemented with the possibility for the Court to extend the review of the constitutionality of the disputed act beyond the submitted initiative. Namely, Article 26 explicitly states that: "*In reviewing the initiative from Article 23 of this Act, the Constitutional Court is not limited by the claims or provisions challenged in the same.*[17]"

This procedural provision implies that whenever the Court, during a review of constitutionality, finds that beyond the mentioned provisions there are other contentious provisions whose constitutionality should also be reviewed, it may act beyond the submitted initiative. Hence, *ultra petitum* action is yet another small segment in the system available to the Constitutional Court in exercising its competencies.

The two provisions concerning the Court's ability to initiate *ex officio*

[16] Act for the Constitutional Court 2024. Art 23(4).
[17] Act for the Constitutional Court 2024. Art 26.

constitutional review proceedings are formulated too broadly, giving the normative framework the appearance that the Constitutional Court is the most powerful institution in the system. The following arguments are commonly cited in discussions about how (un)desirable this solution is:

- the fact that initiating proceedings *ex officio* disturbs the balance of the principle of separation of powers;

- it opens the door to judicial activism, which "raises the question of the Court's legitimacy to 'lead policy'"[18]; and

- this competence undermines the position of the Constitutional Court as a neutral body.

It is often noted that by initiating proceedings *ex officio*, the Court may prejudice its own decisions, since it indirectly takes a stance on the disputed provisions.

The procedural solution that allows the Court to initiate *ex officio* proceedings leads to the conclusion that there are no additional conditions that would limit the Court's actions in such cases, and that the Constitutional Court may do so whenever it deems necessary. This provision grants very broad powers to the Constitutional Court, which, as Deskoska puts it, seems to make this institution "one of the most powerful of its kind in the world.[19]"

In light of the above, the dilemma remains open as to whether this overly broad authority of the Court — without any limitations on its exercise — could lead to juricentrism. In practice, the Constitutional Court has rarely made use of this power, which is no guarantee that it will exercise self-restraint in the future. Consideration should be given to the possibility of allowing the Court to initiate constitutional review proceedings only when, in applying a particular law in a case already before it, the Court determines that the law is contrary to the Constitution. Such a solution would not deprive the Court of a powerful tool, but would restrict its use to specific situations.

2.2.5. The Legal Effect of Decisions of the Constitutional Court

The legal effect of the decisions of the Constitutional Court is determined by the Constitution of the Republic of Macedonia and by the Rules of Procedure

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[18] Justus Rink Hans (1974). *Initiative for initiating a procedure for assessing constitutionality and legality.* Second Conference of European Constitutional Courts. Baden-Baden. / *Иницијатива за покретање поступка оцене уставности и законитости*. Јустус Ринк Ханс. Друга конференција европских уставних судова. Баден-Баден. 1974. Volume 1, p. 33.

[19] Renata Deskoska (2004). *The Constitutional Court in the Republic of Macedonia: Proposals for Reform.* Collected Papers from the International Symposium *Contemporary Law, Legal Science and Justinian's Codification* / *Уставниот суд во Република Македонија: предлози за реформа.* Дескоска Рената. Зборник на трудови од меѓународен симпозиум „Современо право, правната наука и Јустинијановата кодификација'' Volume 2, Skopje, p. 381.

of the Constitutional Court (the act of the Constitutional Court). The legal effect of the decisions of the Constitutional Court of the Republic of Macedonia is *materia constitutionis* and is regulated by the constitutional provisions of Article 112. Thus, the Constitution stipulates that: "The Constitutional Court shall repeal or annul a law if it determines that it is not in accordance with the Constitution. The Constitutional Court shall repeal or annul another regulation or general act, collective agreement, statute, or program of a political party or association if it determines that they are not in accordance with the Constitution or the law."The decisions of the Constitutional Court are final and enforceable."

According to the Rules of Procedure of the Constitutional Court of the Republic of Macedonia, "A decision of the Constitutional Court by which a law, regulation, or other general legal act is repealed or annulled shall take effect from the day of its publication in the Official Gazette of the Republic of Macedonia." The decisions of the Constitutional Court have general binding effect. These are decisions whose effects extend to everyone (*erga omnes tangit*), not only to the parties involved in the dispute. The decisions of the Constitutional Court are binding for all natural and legal persons, in the same way that general legal norms are binding, for which a cassation decision has been made.

From the perspective of the temporal element of cassation, the decisions of the Constitutional Court have either repealing or annulling effect. A repealing decision causes the challenged legal act to cease to be valid from the moment the decision is published in the Official Gazette of the Republic of Macedonia. This decision has *ex nunc* effect, meaning the repeal operates for the future. An annulling decision, however, invalidates the act and all the consequences it has produced. This decision has retroactive effect *(ex tunc).* In situations where the consequences of the annulled act are not removed by the rendered decision, the Court may decide to restore the previous state or to award compensation for damages caused by the application of the annulled act.

Statistical data from the work of the Constitutional Court of the Republic of Macedonia show a tendency of the Court to avoid rendering decisions that annul the challenged acts.

From the perspective of the scope of cassation, the decisions of the Constitutional Court may repeal or annul the entire challenged legal act (*total cassation*), or only certain provisions or parts of the acts subject to constitutional review (*partial cassation*). The possibility to repeal or annul an entire law is yet another mechanism available to the Court, the future use of which will depend on the application of mechanisms under the self-restraint doctrine.

Finally, in terms of legal effect, the decisions of the Constitutional Court are final and enforceable. No legal remedies are allowed against them, and there are no legal obstacles for their execution once they are published in the Official Gazette.

When a decision is rendered that annuls or repeals a challenged article or

part of the act under constitutional review, the resulting legal gap is filled with a new norm adopted by the body whose act was repealed or annulled.

2.2.6. Time-Bound Dialogue and Outdated Enforcement Mechanisms: The Macedonian Equivalent of the Italian "Warning Judgments"

The Rules of Procedure of the Constitutional Court of North Macedonia, enacted in 2024, reintroduce several legal mechanisms originally derived from the Act on the Constitutional Court of the Socialist Federal Republic of Yugoslavia (1963). These provisions reflect the legal and political philosophy of the socialist constitutional model, particularly concerning the legal effect and enforcement of Constitutional Court decisions.

Among the most notable is the rule that obliges the legislature (the Assembly) to harmonize a law with the Constitution within six months following a finding of unconstitutionality by the Court. If the Assembly fails to act within this period, the unconstitutional provision automatically ceases to have legal effect. This mechanism, which allows the norm to remain valid for a transitional period despite its unconstitutionality, is a typical feature of the "open" Yugoslav model of constitutional justice. It was based on a corrective rather than repressive judicial approach, giving priority to political self-correction and accountability, while delaying immediate legal invalidation.

However, within the framework of a modern, pluralist, and democratic constitutional system, these mechanisms increasingly appear inadequate and outdated, for several key reasons:

- There is no effective sanction for the Assembly in case of non-compliance, aside from the automatic termination of the provision — which in practice can be ignored or politically relativized.
- The Constitutional Court has no formal role in supervising compliance, unless it actively re-engages the issue or seeks to exert public or institutional pressure.
- The assumption that the legislature will act responsibly and within the set timeframe is often unrealistic, particularly in periods of political instability or legislative paralysis.
- The framework lacks concrete accountability mechanisms, which reduces the Court's position to that of a symbolic corrector rather than a binding constitutional authority.

As a result, the Court has been effectively deprived of robust tools to exercise its most fundamental function—the protection of constitutionality. While its decisions are formally binding, they remain conditionally effective and limited in their substantive impact.

This institutional fragility is further underscored by the model's resemblance to diffuse systems of constitutional review, where unconstitutional norms

may be declared inapplicable but not formally annulled. This is in contrast with the European centralized model, in which the decision of the Constitutional Court has immediate and direct legal effect.

Despite these structural limitations, the 2024 Rules of Procedure introduce a noteworthy procedural innovation: in certain cases, the Court may grant a deadline of up to six months for the issuing authority to amend or supplement a contested act in line with the interpretive views expressed by the Court. If the body fails to act within this timeframe, the procedure continues, paving the way for a more assertive judicial response.

This approach closely parallels the Italian Constitutional Court's "warning decisions" (*sentenze monito* or *doppie pronunce*), especially when addressing politically sensitive or complex legal questions. In such cases, the Italian Court may signal the unconstitutionality of a provision, while delaying formal annulment, thereby inviting the legislator to remedy the defect voluntarily.

In the Macedonian context, this mechanism introduces an element of structured constitutional dialogue, wherein the judiciary acknowledges the legislature's normative primacy while retaining supervisory authority. Far from being a sign of judicial restraint, this form of conditional compliance represents a refined model of institutional judicial activism. It enables the Court to shape constitutional outcomes indirectly, while preserving systemic stability and avoiding unnecessary legal vacuum.

If the legislature fails to act, the continuation of the procedure—which may lead to annulment — mirrors the second phase of the Italian model, where the Court ultimately issues a *sentenza di accoglimento* (annulment decision) upon disregard of its earlier warning. Thus, the Macedonian provision should be understood as a hybrid enforcement mechanism — combining dialogue with conditional finality, offering the political branches an opportunity to align with constitutional principles under the latent threat of judicial invalidation.

A provision of this nature may contribute to a persistent imbalance within the constitutional architecture of the Republic of North Macedonia, especially if it affects the distribution of competences among the branches of government or allows one institution to dominate the constitutional space. Although it may not amount to a constitutional crisis in the strict sense, its normative and institutional implications require careful examination, particularly in light of the fragility of democratic consolidation and the evolving role of the Constitutional Court.

A provision that allows an unconstitutional law to remain temporarily valid — while waiting for legislative correction — can indeed trigger or deepen a constitutional crisis, especially when placed within a democratic system where parliament represents the will of the people and embodies popular sovereignty.

This tension arises from a conflict between two fundamental constitutional principles:

- Supremacy of the Constitution;

- Democratic Legitimacy of the Parliament, as the democratically elected body, expresses the sovereign will of the people. Interference with its legislative authority must be limited and well justified.

When a court issues a ruling that finds unconstitutionality, but the law continues to apply for up to six months, this provisional tolerance of unconstitutionality creates a paradox:

- The law remains in force, despite violating the Constitution.
- The Court, although recognizing the conflict, defers to the legislature, potentially weakening its own authority.
- Citizens remain subject to unconstitutional norms, violating the principle of legal certainty and rights protection.

If the parliament fails or refuses to act, and the unconstitutional norm remains in effect — or if its termination is ignored — this can escalate into a constitutional crisis, particularly if:

- The Court does not enforce its own ruling (due to weak mechanisms, e.g. no coercion or sanctions).
- The legislature claims democratic legitimacy to refuse compliance.
- Other institutions (e.g., administration, judiciary, police) are divided on which norm to follow — the unconstitutional law or the court's ruling.

This situation can generate legal fragmentation, institutional paralysis, and erosion of public trust in the constitutional system.

2.2.7. Soft Enforcement and Constitutional Dialogue: Reinterpreting Articles 90 and 91 as Activist Judicial Tools

Regarding the enforcement of decisions of the Constitutional Court, the Rules of Procedure of the Constitutional Court provide that the decisions of the Constitutional Court shall be enforced by the subject that adopted the law, regulation, or general act that has been annulled or repealed by the decision of the Court. To ensure enforcement, the Constitutional Court may, when necessary, request public authorities to secure the implementation of its decision[20].

In cases of non-enforcement, and based on previously obtained information and reports, the Constitutional Court may adopt a special resolution establishing that its decision has not been enforced, and shall notify the competent public prosecutor as well as the authority that appointed or elected the head of the body or institution that failed to enforce the Court's decision[21].

While Articles 90 and 91 of the Rules of Procedure empower the Constitutional Court of North Macedonia to request enforcement and identify non-com-

[20] Act of the Constitutional Court, art. 90.
[21] Act of the Constitutional Court, art. 91.

pliance with its decisions, these provisions do not include direct coercive or punitive measures. Although not a coercive provision, Article 90 grants the Court the discretion to act proactively in safeguarding the implementation of its rulings, particularly in the face of resistance or inaction by other branches of government. This reflects a form of institutional self-defense, characteristic of courts with activist tendencies. Nevertheless, the importance of both provisions lies in the symbolic authority and procedural influence they confer upon the Court, enabling it to function as a soft enforcement tool in the broader constitutional system.

Through Article 90, the Court may formally request action by public authorities to secure compliance with its rulings, while Article 91 allows the Court to publicly acknowledge non-compliance and notify relevant institutions, such as the public prosecutor or appointing authority. These actions do not compel enforcement through sanctions, but rather operate by exerting institutional and political pressure, thereby reinforcing the Court's authority through symbolic legitimacy and public accountability.

This mechanism exemplifies a more dynamic and engaged form of constitutional review, where the Court assumes a role not only as adjudicator but also as monitor and promoter of constitutional compliance. In this framework, judicial activism is not expressed through direct intervention or usurpation of legislative functions, but through dialogical engagement with other branches of government and institutional signaling that promotes adherence to constitutional norms.

Such an approach is fully consistent with modern understandings of dialogical and institutional judicial activism, in which courts assert their constitutional authority not solely through legal finality, but through ongoing communication, moral suasion, and public reasoning. Articles 90 and 91, though procedural in nature, thus become instruments of influence, allowing the Court to maintain its role as an active guardian of constitutionalism even in the absence of traditional enforcement powers.

3. Conclusion

Judicial activism, particularly when facilitated through the flexible or even strategic use of constitutional provisions, must be critically assessed through the lens of constitutionalism — the foundational principle that government powers must be limited, defined, and exercised in accordance with the Constitution. While constitutionalism affirms the role of courts as guardians of the constitutional order, it simultaneously emphasizes the principle of separation of powers, institutional balance, and respect for democratic legitimacy. When courts interpret vague or broadly worded constitutional norms — such as human dignity, social justice, or the rule of law — they may be tempted to expand their interpretive reach, engaging in judicial activism under the guise of constitutional fidelity.

In this context, judicial activism may present itself as a mechanism for

protecting the constitutional order — especially in situations where legislative or executive bodies fail to uphold fundamental rights or act contrary to constitutional values. Courts often justify such interventions as necessary correctives to political dysfunction or institutional inertia. However, from the standpoint of constitutionalism, this raises a tension: can judicial self-empowerment be reconciled with the Constitution's commitment to limited government and democratic accountability?

If courts begin to regularly stretch or reinterpret constitutional provisions to enter domains traditionally reserved for the political branches, they risk transforming from constitutional arbiters into political actors, thereby disrupting the equilibrium envisioned by constitutionalism. In doing so, the judiciary may inadvertently concentrate power within an unelected institution, undermining the constitutional principle that legitimacy arises from the people through their elected representatives.

This risk becomes particularly pronounced when judicial activism is not an isolated reaction to institutional failure but is instead structurally enabled and sustained by the normative framework itself. As demonstrated in the case of the Republic of North Macedonia, mechanisms such as the absence of a Law on the Constitutional Court, the Court's authority to regulate fundamental procedural and institutional matters through internal acts, broad locus standi, the power to initiate proceedings ex officio, and ambiguous enforcement mechanisms all contribute to a normative environment that implicitly supports or even encourages activist judicial behavior. These mechanisms not only expand the interpretive and institutional discretion of the Court but blur the boundaries between judicial review and normative governance.

Taken together, these features raise an urgent dilemma: what should we expect *pro futuro* in a constitutional system where judicial authority is increasingly unconstrained? Can a constitutional framework that leaves so much to the autonomous interpretation of the Court maintain equilibrium between the branches of government, or does it sow the seeds of a deeper systemic imbalance? The lack of clear legal boundaries and accountability mechanisms opens the door to possible institutional friction or even constitutional conflict between the Constitutional Court and the Assembly, particularly in politically sensitive or high-stakes cases. In this light, the normative framework itself may become a latent source of constitutional and political crisis — not merely as a matter of interpretive overreach, but as a structural failure to ensure a coherent balance between judicial power and democratic legitimacy. The Macedonian case thus underscores the need for constitutional reform that does not weaken the Court's independence but fortifies its legitimacy through clearer delineation of roles, responsibilities, and limits. Without such recalibration, the long-term stability of the system may rest on nothing more than the self-restraint of judges and the goodwill of politicians — an inherently fragile equilibrium.

In light of these findings, this paper proposes several concrete reforms. Most importantly, it is necessary to adopt a dedicated Law on the Constitutional Court. However, under the current normative framework and the constitutional provisions of the 1991 Constitution, such a law cannot be adopted without first initiating a constitutional amendment/constitutinal revision. This fundamental reform should aim at clearly distinguishing between constitutional and statutory matters — those that are to be regulated by the Constitution and by law, respectively — and the internal matters that may be governed through the Rules of Procedure of the Court as an act of institutional autonomy.

This structural clarification is essential in order to regulate, in a more detailed manner, both the substantive elements relating to the Constitutional Court and the procedures conducted before it. Matters such as the initiation of proceedings, the role and standing of participants, the legal effect of the Court's decisions, and — most importantly — the relationship of the Court with other constitutional bodies, must be subject to precise and comprehensive legal regulation. This is not only necessary for improving procedural clarity, but also for ensuring institutional stability and maintaining the overall equilibrium of the constitutional system.

Moreover, this reform must not overlook the introduction of a constitutional complaint as a specific legal instrument for the protection of human rights and fundamental freedoms. The current absence of this mechanism represents a significant normative gap, one that weakens individual access to constitutional justice and hinders the full realization of constitutional guarantees. Addressing this issue would strengthen the constitutional positioning of the Court and align the Macedonian system with established comparative standards in constitutional adjudication.

While the focus of this analysis is the Republic of North Macedonia, the identified structural challenges and reform proposals bear direct relevance for other states with similar constitutional arrangements — particularly those in post-socialist jurisdictions[22]. In many of these systems, constitutional courts were introduced as guardians of constitutionalism in fragile democracies. The Macedonian case thus serves as a useful reference point for understanding how the absence of a dedicated constitutional court law, combined with broad access to justice and self-regulatory discretion, may encourage forms of constitutional activism that strain the separation of powers. Lessons drawn from this context can inform ongoing debates in other transitioning democracies, where similar courts

[22] See Bernard Chavance (2008), „Formal and Informal Institutional Change: The Experience of Postsocialist Transformation". *The European Journal of Comparative Economics*, Vol. 5, no. 1: 57-71; Sadurski Wojciech (2002). *Constitutional Justice East and West, Democratic Legitimacy and Constitutional Courts in Post – Communist Europe in a Comparative Perspective*. Kluwer Law International, The Hague, p. 50 et seq.

face comparable tensions between their independence, legitimacy, and constitutional restraint.

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