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The Constitutional Court of the Republic of Macedonia: Proposals for Legislative and Administrative Reform

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Abstract:
This paper deals with the role of the Constitutional court of the Republic of Macedonia in building constitutionalism. For that purpose, the concept of constitutionalism and two competences of the Constitutional court are analyzed: judicial review and the competence to decide on demands for protection of some rights (quasi-constitutional complaint). In performing of these two functions the position of the Constitutional court of Macedonia is compared with that of the Constitutional court of Slovenia, because these two countries shared same historical experience, but constitutionalism and human rights protection in Slovenia are on higher level.

1. The notion of constitutionalism

"Freedom ordains rules. Government is lost liberty." This is the paradox, which has confronted Western theories on the constitutionalism since the earliest time.1 The idea that all governmental power, no matter how democratic, should be limited and controlled is in the essence of the constitutionalism. This doctrine of limited government regards governments as a threat to liberty. Its protection is in keeping governments confined within, as Joseph Raz wrote, proper moral bounds.2

The "constitutionalism" is one of those commonly used concepts, with more connotations and without clear definition for any of them. The remark of many scholars is that "without a clear definition, the term 'constitutionalism' is an invitation to debate about ghosts or, to shift the metaphor, to enter a trackless verbal swamp"3 ; and also that "constitutionalism is one of those concepts, evocative and persuasive in its connotations yet cloudy in its analytic and descriptive content, which at once enrich and confuse political discourse."4

So, when we speak about constitutionalism, many questions appear, as are the following: What does the constitutionalism mean? Does it contain its own essential core, which distinguishes it from the concepts, as are democracy, liberalism, rule of law? What are the relations between the constitutionalism and these notions? Does the constitutionalism have more connotations? Are there different kinds of constitutionalism? Etc.

Traditionally, constitutionalism means limited government, i.e. it expresses the conviction of necessity of limiting state power by legal means. So, most often the constitutionalism is defined negatively, as a system of legal limitations of state power. Its opposite in this sense is arbitrary,5 absolutist, authoritarian or totalitarian government. The negative definition of the constitutionalism is pointed "whenever reflection is focused on abuses of political power, as in the typical account of modern English constitutionalism, which tells the story of the progressive wresting of political power from the hands of an absolute - in principle if not in fact - monarch by more or less representative institution. In the face of these precedents, it is important for us to emphasize that the concept of constitutionalism is two-edged, that it has a positive as well as negative aspect.6 A constitution both empowers and delimits power, both grants authority and specifies its scope and purpose. Recognition of this duality is especially important in the case of the United States…" 7

It should not be forgotten that "[w]ithin any modern state, citizens are structurally related to state authority in three basic ways. Citizens are collectively the sovereign creators of state authority, they are potentially threatened by state-organized force and coercion, and they are dependent upon the services and provisions organized by the state."8

That means that the idea of constitutionalism is neutral vis-à-vis the amount of power and to limit the power does not mean to minimize it. The criterion to determine whether a government is constitutional or not is not the amount of power but its quality. Who exercised the power is presupposed question. The basic question for the constitutionalism is how the power is exercised.

So what is the constitutionalism?

It is idea, ideology and theory of the limited and controlled power in the same time.9

For Carla M. Zoethout and Piet J. Boon, generally speaking, constitutionalism has two connotations, which are closely connected. On the one hand, constitutionalism is used to indicate the striving for codification of the state's organization. On the other hand, constitutionalism refers to a political ideal regarding the organization of the state.10

As a political ideal, the constitutionalism refers to the necessity of limiting and controlling political power as means for preservation of human rights and expresses the conviction that the politics should be bound with legal frames. That ideal connects the substantial aspect of constitutionalism (protection of human rights) and its formal aspects (legal limitations - "Power is prescribed and procedures prescribed."11)

Or said in other words, the demands of the constitutionalism are:
n depolitization of decision making
n procedural limits on the exercise of power
n values in the regulation of citizens and groups in their basic social contacts.12

According to Carl Friedrich constitutionalism has its philosophical, structural, legal, documentary, procedural and normative meaning. Constitutionalism is based on the principles of law and legal state; so it is principle or system in which the law rules and human rights are not only highest value, but also they must be guaranteed and protected in institutional manner. It is a system of effective, systematic and institutionalized limitations of the political power which aim is preservation of the human rights.

So, the control of political power is not the only goal of the constitutionalism. Constitutionalism also seeks to make government possible and to provide visions of legitimate and just system for government.

Ulrich Karpen defined constitutionalism as "primarily protecting the individual liberty by representative democracy, separation and division of powers and inviolable rights."13

Starting from the fact that there are many definitions of the term constitutionalism we can conclude that its essence could be best described through its elements (benchmarks).

2. The essence (elements) of the constitutionalism

Different authors point out different elements of the constitutionalism.14 But the essence of the constitutionalism could be described through the following benchmarks:

1. Limited government - The constitutionalism incorporates in itself demand for government, which will not be voluntary, subjective and arbitrary. "People have one serious enemy, their own government", said Saint-Just in the debate on the French Constitution of 1791. Because of that government should be limited.

According to Jozeph Raz, two ways of limiting governmental authority are possible. The first limits governments by denying their authority either to act in order to promote any conception of good life, or to act in ways, which help one conception of the good life more than other. The second is through a doctrine of fundamental rights, which are not to be trespassed by governments and therefore set limits to their authority.15

The doctrine of constitutionalism is doctrine of political authority. So, the government in constitutionalism is limited by human rights and separation of powers.16 The principle of human rights is external principle, which confines state powers in relation to civil society. The principle of separation of the power is internal principle, which preserve that no state body or person can prevail within the state, i.e. it is prevention for a concentration of the power in a way that it becomes a threat to individual liberty. The separation of powers has two aspects: separation between the different branches of government (the check and balances make the system with separated branches of government works) and separation between different levels of authority (federalism).

2. Consent of the governed - One of the benchmarks of the constitutionalism is the government derived from the people and which exist by their consent. The first ideas of the constitutionalism (Hobbes, Locke) were based on the conception of contract (trust). The idea of government as a trust still exists. The ruler is the agent of the people, because "all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them."17 The test of constitutionalism at work is whether the constitution establishes genuinely representative institutions, bolstered by the freedom to form political parties, ready to access to the ballot, and free and robust debate on public issues.18

3. Existence of higher law - The constitutionalism presupposes existence of system of constitutional rules which are superior to all other laws created by any body of the state and which are binding on all state bodies. So, the constitutionalism includes the idea of constitution or fundamental law, which means that the state or any system of government must be founded upon law, while the power exercised within the state, should conform to definite legal rules and procedures. When government acts according to these basic rules (which are not necessarily written) its actions are predictable, and "predictability of state actions is basic rule of constitutionalism."19

4. Protection of human rights - sanctity of the individual- The human rights are essential element and aim of the constitutionalism. The ideas of natural rights were powerful force in shaping constitutionalism. The concept of natural law is only inherent to the constitutionalism. The constitutionalism is anti-positivistic in its essence. A real test for existence of the constitutionalism is whether human rights are guaranteed and protected. The sanctity of the individuals and protection of their rights is matrix of constitutionalism. To the extent that commitment to rights is necessary condition of constitutionalism, the argument is circular: constitutionalism is necessary for rights, and rights are necessary for constitutionalism.20 This element will be elaborated in the further text.

5. Rule of law21 - Some authors prefer the term "government under the law", on the ground that it is more accurate than "the rule of law". But it is too narrow and it is an important part of the rule of law, but not the whole.

In its most general sense, the rule of law as a principle of limited and controlled political power by the law may be equalized with the constitutionalism. But they are not the same.

The "rule of law" could be defined starting from different approaches.22 In its different meanings rule of law includes internal morality of law, supremacy of the law, exclusion of arbitrary powers, equality before the law, guarantees of human rights etc. No matter by which approach the rule of law is defined; it is closely connected with the constitutionalism, as a foundation of constitutional democracy. The constitutionalism as well as rule of law is value-oriented concept.

The rule of law is the focus of justice. In understanding and applying the rule of law - principle, two strands may be used:
"- the value oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom;
- the structure oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, and institutional arrangements.

In the model of the rule of law - state with separated and divided powers those two strands are intertwined in a single, grand fabric of law and politics. The concerns that inspire the system's design are human; the design itself is mechanical… But, in the rule-of-law state structure serves substance in a framework basically designed by the constitution and ultimately supervised by a disinterested judiciary."23

The best well-known scholar who laid down the foundations of rule of law is Albert Venn Dicey. Dicey`s exposition of the rule of law rested on 3 premises:

a) The absence of arbitrary power - no man is above the law and no man is punishable except for a distinct breach of the law established in the ordinary manner before the ordinary courts.

b) Equality before the law - every man is subject to the ordinary law and the jurisdiction of the ordinary courts

c) Judge-made constitution - the general principles of the British constitution, particularly those governing the liberties of the individuals, are result of judicial decision conforming the common law.24

He claimed that English constitutionalism combined two guiding principles: a) sovereignty of Parliament and b) the rule of law; and was criticized that his model is contradictory. The constitutional customs and conventions are relevant for rule of law. If parliament has sovereignty as Dicey claimed, then how could it be bound by rule of law? The problem called auto-obligation dilemma implies that a political body that is sovereign cannot lay down institutions that bind itself.25

So, the question that rises is the question whether the constitutionalism and sovereignty can be harmonized. Similar and closely connected with this is the question about harmonization of the constitutionalism and democracy, i.e. the question about "countermajoritarian dilemma."

3. Constitutionalism and democracy: an oxymoron or not?!

As it has been stressed by D. Hume and a long line of theorists down to F. Wieser, the constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion, which makes people obey.26

The constitutional government means that the government of a state is in accordance with well-defined principles and rules, which are not wholly fixed and unchangeable, but they cannot be changed at the mere whim of a person, group or even majority in the Parliament.27

So, the constitutionalism raises a number of important moral as well as legal issues.

Constitutionalism refers to limits on majority decisions, more specifically to limits that are in some sense self-imposed.28 In constitutionalism, the sovereign people commit themselves to be bound by fundamental law, which limits what any popular majority may legitimately do, or the way in which it may legitimately do it. So, at a psychological level, constitutionalists tend to be more pessimistic about human nature and efficacy of the checks of democratic political processes as protectors of fundamental rights.29 The theory of constitutionalism rejects the romantic notion of utopian societies consisting of altruistic individuals.30

If the rights of the people are best protected when lodged in the hands of the people themselves (theory advocated by Jefferson in America) and "the pure original foundation of all legitimate authority is the consent of the people" (as it is said by Alexander Hamilton in "The Federalist")31, why should people tie their hands to a "higher law" and why should democratic government be limited? Or "in its most basic form, the question …is why a nation that rests legality on the consent of the governed would choose to constitute its political life in terms of

commitments to an original agreement…deliberately structured so as to be difficult to change."32

So, if constitutionalism means that democratic rule of the people is limited by some restrictions imposed by the higher law, does it mean that constitutionalism is "antidemocratic"?

F.A. Hayek33 explains that only a demagogue can represent as "antidemocratic" the limitations, which long-term decisions and the general principles held by the people, impose upon the power of temporary majorities. These limitations were conceived to protect the people against those to whom they must give power, and they are the only means by which people can determine the general character of the order under which they will live. So, by accepting general principles, they will tie their hands as far as particular issues are concerned.34

The fear of majority tyranny leads to insulation of the normal operation of government from the immediate influence of the popular will.

It means that the temporary majority must abide by more general principles laid down a long period ago. So, as F.A. Hayek wrote: "a constitutional system does not involve an absolute limitation of the will of the people but merely a subordination of immediate objectives to long-term ones"35. That means that constitutions may not be "periodical literature", but neither they are "holy writ".

Non-existence and non-respect of such principles may easily lead to descending of the majority rule into majority tyranny, as it happened after the French Revolution.

So, what is the relation between the constitutionalism and democracy? The answer to this question depends on the formulation of each of these concepts, i.e. how the key concepts are defined.36

Democracy refers to how power is acquired and retained. Constitutionalism refers to how power is granted, dispersed and limited. A state could be democratic without being constitutional, as it was in Athens in the time of Pericles,37 and it also could be constitutional without being democratic, as it was in England in XVII century.

Judith Squires explains that constitutionalism comprises two key elements: rights provisions which are designed to fence off certain areas from majoritarian control and which operate as legal constrains upon the political process; and structural provisions (separation of powers, the representative system etc.) which ensure that government will act in the interests of the public at large. So, structural provisions limit potential threats to democracy through the political process itself, and rights provisions limit the dangers of democracy by expelling certain issues from the political agenda altogether.38

There are different opinions about the relation between the constitutionalism and democracy in theory. Some authors make difference between strong and weak constitutionalism and point out that "weak constitutionalism would complement democracy by bringing to it more stability in social decisions, while strong constitutionalism may run into conflict with democracy, because

there could be too many immunities and too much inertia for social decisions to simply reflect the preferences of the citizens according to the requirements of anonymity, neutrality and positive responsiveness."39 There are authors who regret that strong constitutionalism may bring about decline in democracy;40 other think that the values of the strong constitutionalism compensate the reduction in democracy;41 third point that the constitutionalism enables democracy etc. Some constitutional theorists (Stephen Holmes) maintain that democracy needs constitutionalism to prevent self-destruction: "without tying their hands, the people will have no hands."42 Or, to borrow John Elster`s Homeric metaphor, the constitution maker, like Ulysses binds himself to the mast because he knows that when he listens to the sirens, he is incapable of resisting the temptation their song presents if he is not tied to the mast. So democracy, which is built in constitutionalism, depends on how we bind ourselves to the mast. Similarly, in Friedrich Hayek`s phrase constitutions reflect the idea that Peter when sober can act to bind Peter when drunk. In this sense is also the attitude of John Potter Stockton that "constitutions are chained with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy."43

It is sure that democracy without limitations could be chaotic and destructive of the minority, as well as a constitutional state without democracy could become irresponsible and corrupt. Or, as it is said by Iris Young "democracy must indeed always be constitutional; the rules of the game must not change with each majority's whim, but rather must be laid down as constrains on deliberation and outcomes, and must be relatively immune to change."44

The connection between constitutionalism and democracy goes in the direction that constitutionalism enables democracy. It performs an important role in consolidating democratic reforms.45 Constitutionalism with its human rights and rule of law is indispensable for democracy. There is not dispute over importance of human dignity between constitutionalism and democratic theory, but over the question how best to protect this value. Constitutionalism does not reject democratic processes. It treats them as a means - necessary, but insufficient for protection of human dignity. "Constitutionalism is suspicious of democracy, but this does not necessarily mean that there is animosity."46

So, the constitutionalism and democracy should be regarded as correlative concepts with same aim and which should be embodied in the modern constitutional state, because the ideal of democracy is so effective that a modern constitutional state cannot exist without democratic legitimacy.

The similar problem raises in regard of the relation between principle of democratic rule and constitutional review which is exercised by the Constitutional court. The question is whether constitutional court can repeal laws, which are adopted by the body, which is source of democracy- Parliament.

Constitutional courts are considered as guardians of constitutionalism and constitutionality. So, some of the arguments that apply on the correlative relationship between constitutionalism and democracy, can apply on this question too.

4. The role of the Constitutional courts in protection of human rights

The Constitutional Court is considered to be cornerstone of constitutional democracy, just as Parliament is the hallmark of representative democracy.47 The Constitutional court is trusted to secure the enjoyment of the human rights through the observance of the constitution. Although, through performing of all its competences the Constitutional court contribute to the protection of human rights, most important for human rights protection are: protection against a specific violation of fundamental rights usually in an individual act, or failure to act (constitutional complaint) and protection against general rules mandated by legislative or executive power (judicial review).

Separate from the ordinary judiciary but within the sphere of justice, the Constitutional Court in Republic of Macedonia (RM) stands out in the way it supports the system from within, safeguarding the values of the constitutionalism through the use of checks and by means of the right of individual appeal for the human rights protection.

Constitutional judiciary is not something new in RM. Constitutional Court as separate institution for judicial review of the constitutionality and legality of the rules, was introduced for the first time in this country in 1963. The Constitution of 1963 in Macedonia combined the principle of unity of powers with the Constitutional Court as a new institution with a competence to control the constitutionality of laws and constitutionality and legality of other rules. That was an effort to unite inner control i.e. the principle of self-review with outer control. The dominance of the assembly in this country was supported with the rule that Constitutional Court had a right to repeal the law, but only after six months from the moment when they have declared it unconstitutional. The Assembly was obliged in the period of six months from the day when Constitutional Court announced the decision that the law was unconstitutional, to make it compatible with the constitution. The Constitutional Court did not have the right to suspend the application of the unconstitutional law in the following six months.

The Constitutional Court in this country was also entitled to decide on the protection of the right to self-management and other basic human rights guaranteed by the constitutions, when those rights were violated by a certain act or activity of a state organ or the local community body, on the condition that there was not other judicial protection provided for such violation. That means that this power of the Constitutional Court was subsidiary; and it was not realized in the practice.

5. Judicial review

"The most successful export"48 of the U.S. constitutionalism in Europe and in the whole world was judicial review, a court's power to invalidate laws and other acts on constitutional ground.

But different from American model of constitutional review which is "decentralized" type and gives power of judicial control over constitutionality of legislation to all judicial bodies in the legal system; the model which is dominant is referred to as "European" or "Austrian" and is

characterized with authorization of one single judicial organ which experience judicial review ("centralized" type).

The founder of this "Austrian" model of judicial review was Hans Kelsen who envisioned a hierarchy of sources of law in which the constitution occupied the principal position. Kelsen had engineered the Constitutional court, which was separate, and singular body vested with judicial review. He felt that if the regular courts were given the right to judicial review, the judicial branch would eventually dominate the other branches of government and assume a legislative function.[49]

Following Austria, judicial review by the Constitutional court is adopted in Germany, Italy, France, Cyprus, Turkey, Portugal, Spain, Belgium, Poland, Bulgaria, Croatia, Czech Republic, Hungary, Macedonia, Slovenia etc.

The judicial review has indirect effect on human rights protection, by protecting constitution and constitutional values among which are human rights.

Constitutional control over norms could be divided in different types. Depending on the time when the control is performed - before or after a law has been put into effect, two different types of judicial review exist: preventive (a priori) and repressive (a posteriori) review.

In some countries only repressive review exists (Macedonia), in other the both types exist (Austria, Italy, Germany, Spain, Hungary) and France recognizes only preventive control of the constitutionality of the norms.

Preventive review of norms means review by the Constitutional court prior to the enactment of normative acts. In some legal systems, as it is in Portugal, all normative acts with the force of law (laws, decree-laws, regional legislative ordinances, international treaties) may be subject to preventive review on all grounds. In other, as it is in Austria, Italy, Spain preventive review is limited to question concerning the distribution of powers between the central state and its subdivisions (federated states, regions), or, as it is in Spain, to international treaties.[50]

As it could be seen the scope of the preventive review can be limited by limiting this review only to some specified questions (Austria, Italy). It could be also limited to specific category of laws (in Germany), or by limiting the subjects who are entitled to invoke this kind of review, as it is France (President of the Republic, chairman of the National Assembly and of the Senate, Prime Minister or sixty members of the Senate) or in Romania (President of the Republic, President of either Chamber of Parliament, the Government, the Supreme Court of Justice, at least fifty Deputies, twenty-five Senators, or ex officio), or in Portugal (President of the Republic).

The advantage of the preventive review is that it prevents promulgation of unconstitutional acts and in that way it prevents violating human rights on the base of unconstitutional laws.

But, in some legal systems, the objection of unconstitutionality established by the Constitutional court can be removed by the legislature. For example, in Hungary in cases of unconstitutionality, the law or orders shall be returned for reconsideration and if the law is passed again in the same

formulation by a majority of at least two-thirds of the members of each Chamber, the objection of unconstitutionality shall be removed, and promulgation thereof shall be binding (Art. 145 (1)). The same solution is also accepted in the Constitution of Portuguese Republic (Art. 279(2) and (4)).

Repressive control is judicial review on the acts, which has been put into effect. This control can be made without any reference to a concrete conflict arising from the application of the law in particular case (abstract review) or with reference to a concrete conflict (concrete review).

Abstract review is a procedure whose aim is to safeguard the objective constitutional order, i.e. not the individual interest, but interest of a community is the primary aim of this review. It is provided in most of the constitutional systems: Austrian, Bulgarian, Italian, Portuguese, Spanish, German, Russian, Slovenian, Macedonian, Turkish, Lithuanian, Hungarian etc.

Concrete review is procedure where a court or other body in a case pending before it has doubts or considers a law to be unconstitutional where the validity of that law is relevant for its decision and refers the issue of its constitutionality to the Constitutional court.[51] Such kinds of procedures are provided for in most constitutional systems, as in: Bulgaria (Art. 109/1), Italy, Austria (Art. 89/2-4, 139/1. 139a), Russia (Art. 125/4), Lithuania (Art. 106, 110/2). Romania (Art.144 lit.c.), Turkey (Art. 152), Spain (Art. 163), Slovenia (Art. 156), Estonia (Art. 152), Croatia, Slovakia (Art. 144), Czech Republic (Art. 95), Kazakhstan (Art. 101/2), Kyrgyztan (Art. 87), Germany (Art. 100/1) etc.

By performing their function of judicial review constitutional courts contribute to the consolidation of the constitution as a "real judicial norm". Constitutional courts also play a role of a certain guarantee against possible abuses of power. But, to be able to perform these function, constitutional systems has to provide fulfillment the preconditions for its independence in the manner in which they are demanded for the ordinary judiciary.

Although judicial review is aimed at guaranteeing the objective interest of the legal system in the constitutionality and legality of the legislation, this interest is joined with the desire to protect concrete rights that have been injured by the legislator. Safeguarding the legal system and protecting individual rights are complementary rather than opposite goals, especially when one considers that "the more intensively and directly rights are defended, the more objective and just is the legal system."[52]

Having a common past and experience with the Constitutional Courts, Republic of Macedonia (RM) and the Republic of Slovenia (RS) in 1991 adopted a new constitutions which introduced constitutional jurisdiction with some common elements, as well as with some important differences, which are noticeable in their competencies connected with human rights protection: review of constitutionality and legality of the general legal rules and deciding on individual appeal for the human rights protection.

The power to determine the constitutionality and legality of the legal rules is the basic right and duty, which is in the competence of every Constitutional Court. The Constitutional Courts of RS and RM can perform a posteriori judicial review. The constitutions of RS and RM determine this

competence of the Constitutional Courts by enumeration of its concrete elements. The list of elements, which this competence of the Constitutional Court is consisted of, is more elaborative in the Constitution of RS.

According to the Art. 160 of the Constitution the Constitutional Court of RS decide on:

- matters relating to the conformity of statutes with the Constitution
- matters relating to the conformity of statutes and other regulations with ratified international agreements and with general principles of international law
- matters relating the conformity of the non-statutory regulations with the Constitution and with statute
- matters relating to the conformity of local government by-laws with the Constitution and with statute
- matters relating to the conformity of the general acts issued for exercise of public authorities with the Constitution, with statute and with non-statutory regulations.

These competencies of the Constitutional Court of RS with some differences are repeated in the Art. 153 of the Constitution devoted to the conformity of legislative measures and in the Art. 21 of the Law on the Constitutional Court (Official Gazette of RS, No. 15/94). Most of the differences between these Articles are "cosmetic" in their expression, but only one is essential.

For example Art. 153 of the Constitution uses the term "international treaties currently in force, which are ratified by the National Assembly"; Art. 160 uses the term "ratified international treaties". These articles can also be compared with Art. 8 of the Constitution, which uses the term "international treaties, which bind Slovenia".

The essence of the Art. 8 and Art. 153 is the same. Some difference can arise between these two articles and the Art. 160, because not all ratified treaties must bind the country, or be in force. For some multilateral treaty to become in force it is necessary to be adhered by certain number of countries. So one country can adhere and ratify that treaty, but it will not come in force until enough countries do the same.

Art. 110 of the Constitution of RM provides that the Constitutional Court of RM decides on:
- the conformity of the laws with the Constitution
- the conformity of collective agreements and other regulations with the Constitution and the laws.

As it could be seen, instead of enumeration of the acts which are subject of the judicial review, the Constitution of RM uses the term other regulations which is very broad and entails: by-laws (decrees, decisions of the Government, directions, rules and other acts of the administrative bodies) enacted by the executive power; local-government acts (municipality statute, decisions and conclusions of the municipal council etc.); the acts of the institutions and organizations with public powers; the statutes and rules of the educational, health and other institutions and organizations; the regulations of the Assembly of the RM which do not have status of law (decisions, conclusions, declarations, resolutions and recommendations) etc. These acts are subject to the judicial review if they are general acts i.e. if they are valid for an uncertain number

of entities in RM. But the evaluation whether some act is general or not is in power of the Constitutional Court. The Constitutional Court of RM misused this power to declare itself incompetent for deciding in constitutionality of some acts, which were considered as acts, which are not general, by the members of the Constitutional Court. One very obvious example was the decision of the Constitutional Court of RM that it is not competent to decide on the constitutionality of the Conclusion of the Assembly that there is no constitutional base for Parliament to issue a notice for referendum for pre-term elections.[53] The Constitutional Court decided that it was not competent to decide on the constitutionality of the Conclusion of the Assembly with explanation that it (Conclusion) did not regulate relations, which make this act general, but it was an act of the work of the Assembly with which it decided concrete question(?!).[54] This is very problematic explanation, because it raises many questions, as are the question of the definition of general acts; if the general acts are acts which erga omnes tanguit, whether this Conclusion of the Assembly does not produces consequences erga omnes etc.

This decision showed that the Constitutional Court was not prepared at that time to be check on the ruling power and guardian of the Constitution; as well as that shaping of the competencies of the Constitutional Court with such general expressions in the Constitution can leave space for different interpretations and for maneuver for the Constitutional Court itself.

But similar dilemmas appeared in RS, although its Constitution is more specific in enumeration of the competencies of the Constitutional Court. There were different interpretations of the term "general acts issued for exercise of public authority". Dilemmas about broader or narrower understanding of this notion were present in the Constitutional Court itself, i.e. between its members.[55]

Some questions about the competence that were raised before the Constitutional Court were solved by the court itself, as it was in Resolution U-I-13/91 issued in the case about evaluation of constitutionality and legality of a resolution of the RTV Slovenia Council. The Constitutional Court decided that its competence does not cover the evaluation of general acts passed for the purposes other than the exercise of public power.

The further question that appeared was whether the collective agreements are general acts for exercising public power or not. The Constitutional Court recognized this question as problematic, but avoided to solve it, by finding some other reasons to reject the initiatives, as it was in case U-I-210/94. The Constitutional Court avoided to decide on constitutionality of the paragraph 2, Section C, of the Chapter on applicability of General collective agreements for productive branches of economy, because the procedural requirements from para.2 of the Art. 24 of the Law on Constitutional Court were not fulfilled. But the Constitutional Court admitted that they had problems with this question: "it was not necessary for the Court, within the framework of this procedure, to deal with the question of its jurisdiction for the evaluation of constitutionality of collective agreements". In 1994 the Law on commercial and social courts was adopted, in which Art. 6 empowers these (commercial and social) courts to decide on mutual conformity of the collective agreements and of their conformity with the law. Those provisions were base for further decisions of the Constitutional Court. The court held an opinion that judges in the courts are bound in their work to the Constitution and the law, so judicial decision on the legality of some collective agreement, presupposes a decision on its constitutionality. Krivic

thinks that it is only a way to escape the answer of the problematic question whether collective agreements are general acts for exercising public power or not.

Further question that the Constitutional Court was forced to solve was the determination whether some act is general act or not. In some cases the Constitutional Court decided that acts, which are not binding for individuals and legal persons and cannot have any legal consequences, are not subject to judicial review. These acts are acts for internal activities of state and other agencies (U-I-17/92); working enactment (U-I-78/92); internal general acts by which employment relations in a state were arranged (U-I-378/96); acts of operation (U-I-377/96) etc.

But, neither the theory, nor the practice clarified how to delimit statutes and by-laws from individual acts and other state acts lying beyond the jurisdiction of the Constitutional Court.

The differences between judicial review in RS and RM are not present only in the question of acts on whose constitutionality and legality the Constitutional Court decide, but also in the question with which acts all that rules should be in conformity. In RS the Constitutional Court decides on conformity of the general rules with: the Constitution, statutes, ratified international agreements and general principles of international law.

The question of conformity of some general legal rules with international agreements was raised in several cases before the Constitutional Court. For example in case U-I-2/92 the question of assessment of conformity of some articles of the Denationalization Act (Official Gazette of RS, 27/91) with International Pact of Civil and Political Rights and the European Convention on Protection of Human Rights was raised.

In case U-I-90/91 the question of conformity of some articles of the Law on Foreigners with the Universal Declaration of Human Rights was raised. The Constitutional Court decided that the Universal Declaration of Human Rights has not the nature and authority of an international agreement, so it (Constitutional Court) cannot evaluate a statute being or not in accordance with the Declaration.

The Constitutional Court is not empowered to decide upon mutual conformity of statutes or two local communities' acts. Also the evaluation of the internal harmony of individual statutory provisions is not in the competence of the Constitutional Court.[56] The Constitutional Court of RM also does not have such competence.[57]

The Constitution of RM contains only a competence of the Constitutional Court to decide on conformity of the general legal rules with the Constitution and statutes. So, there is no explicit competence for the Constitutional Court to decide on the conformity of the general legal rules with the ratified international agreements, although they are part of the internal legal order and they cannot be changed by statute (Art. 118). It is a gape of the Constitution, which should be filled in with giving such competence to the Constitutional Court. In the meantime, this problem could be solved through deriving this competence of the Constitutional Court from the provision that establishes primacy of the international agreements over statutes. So, any statute that changes ratified international agreement is in conflict with the Art. 118 of the Constitution. On

the other side, no constitutional base could be found for evaluation of the conformity of the general legal rules in RM with the general principles of international law.

Another difference between the constitutions of both of these countries is connected with the international agreements. The Constitution of RS acknowledges preventive review of the international agreements, while the Constitution of RM does not include such possibility. In the Art. 110 of the Constitution of RM there is not explicit competence for the Constitutional Court a posteriori to decide on constitutionality of ratified international agreements.

There was a case in front of the Constitutional Court to decide on constitutionality of the Law for ratification of the Agreement between the states-parties in North-Atlantic Agreement and other state parties in the Partnership for peace (No. 178/2000). The Constitutional Court of RM rejected this initiative because its content was evaluation of the "content of international agreement". The Court ruled that it did not have such competence. In 2002 the Constitutional court has changed its attitude toward this question and rulled that the Constitution authorised it to evaluate the formal and material characteristics of the Law for ratification of the Bilateral agreement, concluded between Republic of Macedonia and Republic of Greece for building and management of the pipeline. The intrenational agreements, with the act of ratification become part of the legal order of the Republic of Macedonia and they must be in accordance with the Republic of Macedonia (U. br.140/2001).

According to the Art. 160, para.2 of the Constitution of RS and Art. 21 and 70 of the Law on the Constitutional Court, in process of the ratification of international agreements; at the instigation of the President of the Republic, of Government or of no less than one third of the Representatives of the National Assembly, the Constitutional Court shall provide opinion on their conformity with the Constitution. The National Assembly is bound by any such opinion.

While there are differences about (non)existence of preventive review, concrete review exists in both countries. The difference is that concrete review is determined by the Constitution of RS, while in RM it finds its base in the Rules of Procedure of the Constitutional Court (Official Gazette of RM, 70/92)(!!!) and in the Law on courts (Official Gazette 36/95).

The Constitution of RS determines that any person who can show a proper legal interest, as determined by statute, may initiate proceedings in the Constitutional Court (Art. 162 of the Constitution). Further, it specifies that, in event that a court, deciding upon any matter, concludes that a statute, which it must apply, is unconstitutional, it must stay the proceeding and refer the issue of constitutional validity of the statute to the Constitutional Court. The original proceeding in the court may only be continued after the Constitutional Court has handed down its decision (Art. 156). The Law of the Constitutional Court specifies that the concrete review of the provisions could be requested by the ordinary courts, the Public Prosecutor, the Bank of Slovenia and the court of accounts, if a question relating to constitutionality or legality arises during the proceedings they are conducting or if it is submitted by the Ombudsman and refers to individual cases discussed (Art. 23, para.1, subsections 5 and 6 of the Law on Constitutional Court).

These institutions have not used very often their right to raise the question of constitutionality or legality before the Constitutional Court.[58]

The Constitution of RM is silent on the question of who can initiate procedure in front of the Constitutional Court (issue of "standing"). The Assembly of RM has not adopted the Law on Constitutional Court; so most of the questions about the work and status of the Constitutional Court are regulated by the Rules of the Procedure of the Constitutional Court. The constitutional provisions, which are too basic and too modest, and non-existence of the Law, which will regulate the questions connected with the Constitutional Court, gave a lot of space to the Constitutional Court to regulate its status by itself. It is not a positive characteristic of the constitutional system of RM, because it contains possibility the principle of "check and balance" to be violated. It is dangerous, especially in a situation when the Constitutional Court provides a possibility for itself to start a procedure for determination of the constitutionality and legality of the general legal rules by itself (without someone else's initiative).

The Rules of Procedure of the Constitutional Court determine that anyone can give an initiative for starting a procedure in front of the Constitutional Court. That opens a possibility for concrete judicial review. So, this kind of judicial review can be founded on the Art. 12 of the Rules of the Procedure of the Constitutional Court of RM.

The base for concrete judicial review can be found also in the Law on the courts according to which the court give an initiative for starting procedure for evaluation of the conformity of the law with the Constitution when such question arises during the procedure they are conducting. But Art. 12 of the Law on courts contains one very specific competence of the regular courts. It is the possibility when ordinary court considers that the law, which should be applied in an individual case, is not in compliance with the Constitution, the dispute shall be decided on the base of the constitutional provisions, which could be directly applied in that individual case. That is a possibility of the ordinary courts in deciding a concrete case, to exclude an unconstitutional law and to apply the constitutional previsions directly. This means that ordinary courts can decide whether they will apply some law or not, because they considered it unconstitutional. The Law on courts contains the obligation for courts to stop the procedure and to wait for the decision of the Constitutional Court, only when constitutional provisions cannot be directly applied.

As it could be noticed from the previous pages, the initiators of the procedures before the Constitutional Courts in RS and RM are not the same.

In RM anyone can submit the initiative to begin the procedure. The Constitutional Court also can start a procedure without initiative of anyone (Art. 12 and 14 of the Rules of Procedure of the Constitutional Court). The Constitutional Court used this competence several times.[59] The Court has also used the right to broaden evaluation of the constitutionality or legality to some other provisions and questions, which were not asked in the initiative, but which, come out during the work of the court.

RS shared the thought, which is present in most of the countries, that it is undesirable to let everyone have standing to seek abstract review. But, with acceptation of this view, framers of the Constitution, have had dealt with the question how that right should be restricted. They found the solution in the formulation that in RS any person who can proves a proper legal interest may initiate proceedings in the Constitutional Court (Art.162 of the Constitution). The Law on

Constitutional Court determines that legal interest in submitting an initiative shall be recognized if a regulation or general act for exercise of public authority, submitting for assessment by an initiator, directly interferes with his rights, legal interests or legal position.

The Constitutional Court in many decisions tried to define "the proper legal interest" as close as possible. According to the court the proper legal interest is "demonstrated when it is the initiator's own interest, thus his personal interest which is legally recognized and protected. The legal interest must be individual and not a general and abstract interest, in defense of which any individual could appeal. The attribute of initiator can thus only be held by a person who successfully demonstrates that the impugned legal document defines his own rights, obligations or legal benefits" (U-I-163/92). "Evidence of proper legal interest is thus not provided when such legal interest is justified by any such legal status as may refer to somebody else and not the initiator, or when it is justified on such personal ground as are not recognized and protected by law". There was no proper legal interest when "the initiators based his legal interest on an assumed legal status of others, not his own; even if his proposal had been accepted, his legal status would nave remained the same, for which reason he would not have been able to derive direct and personal benefit from this" (U-I-136/92). Neither there was proper legal interest when "the initiators based their legal interest only on the suspicion of prejudice to social assets, and not on prejudice to their rights and interests" (U-I-159/92).

The Law on the Constitutional Court of RS makes difference between right to make an initiative and right to submit a request for starting a procedure for judicial review. A right to submit a request for abstract review is in the competence of: the National Assembly, the National council, the government, representative bodies of local government, representatives of the trade unions; as well as a right to ask concrete review to some bodies, which were already mentioned.

The Constitutional Court of RS does not have right to start procedure on its own initiative (if the initiative by other person or request by some body was not submitted). But when the initiative or request is submitted, in deciding on the constitutionality and legality of a regulation or general act issued for the exercise of public authority, the Constitutional Court shall not be bound to a proposal from that request or initiative. The Constitutional Court shall be entitled to assess the constitutionality or legality of the provisions of this or some other regulations or general acts issued for the exercise of public authority whose constitutionality or legality have not been submitted for assessment, if such provisions are mutually related, or if this is urgent for the solution of the matter. For example, the Constitutional Court of RS used this possibility in the case U-I-184/94, when it abrogated the entire Agricultural Lands Act, reasoning that statutory provisions, which in general limit or exclude the right of ownership on agricultural lands, are inconsistent with constitutional provisions that assure the right to private property and inheritance. The justices ruled that the Court should not annul only selected provisions since the remaining statute would thus become incoherent. The same possibility was also used in the case U-I-25/95 when the Constitutional Court decided to annul seven articles of the Code of Criminal Procedure that regulate special investigatory methods, although the petitioners challenged only two paragraphs of Art. 150.

As it can be seen, the right to ask for judicial review, i.e. the right to challenge constitutionality or legality of some general legal rule in RM is put in hands of everyone. The scope of subjects

who can initiate a procedure in RS is more limited with the demand proper legal interest to be shown.

But even when proper legal interest is shown, that does not mean that the Constitutional Court must start a procedure. Art. 26 para.2 of the Law allows ”discretion” to the Constitutional Court of RS not to accept an initiative if it is clearly unfounded or if it refers to a legally unimportant issue. It is problematic what can be considered as a legally unimportant issue, and that opens a field for discretion to Constitutional Court to decide on this question. But, it must be noticed that Constitutional Court can decide not to accept only an initiatives on this ground, and it does not have that right when request is submitted by the bodies enumerated in Art. 23 of the Law on Constitutional Court.

The Constitutional Court of RM does not have such discretion at all. In that respect, the position of the individuals before the Constitutional Court in RM is legally better protected (although it is done with the Rules of procedure of the Constitutional Court).

The procedures before Constitutional Court in both countries are regulated in the Law on the Constitutional Court of RS[60] and Rules of Procedure of the Constitutional Court of RM. As a result of the procedure for judicial review, if the general legal rule is unconstitutional or illegal, the Constitutional Court can issue different decisions with different legal effect.

The Constitutional Court of RM can issue decision with which it will abrogate (ex tunc) or vitiate (ex nunc) the law, ordinance, enactment, collective agreement, or shortly said every general legal rule if they are not in compliance with the Constitution or the law.

The Constitutional Court of RS can issue different decisions depending on the act, which was under the judicial review. So, it can decide:
- to vitiate (ex nunc) a law - completely or partly
- to vitiate (ex nunc) or abrogate (ex tunc) a non-statutory regulation and general acts issued for the exercise of public authority
- if a law, or other regulation or general act for the exercise of public authority during the procedure for judicial review ceased to be valid, but consequences of unconstitutionality or illegality were not abolished, the Constitutional Court may declare that such act was not in conformity with the Constitution and the laws
- to adopt ascertainment decision, if it determines that the law, other regulation or general act for the exercise of public authority was unconstitutional or illegal because a certain matter which should have ordered was not ordered, or is adhered in a manner in which it cannot be vitaed or abolished. The legislator or body which issued the unconstitutional or illegal regulation or general act issued for exercising public authority must ensure that the unconstitutionality or illegality is abolished within the time-limit set by the Constitutional Court. Constitutional Court of RM does not have such competence.
- to interpret the legal rule. This is special kind of decision of the Constitutional Court of RS, which does not have legal base in the Constitution or in the Law on Constitutional Court. In this decision the Constitutional Court does not vitae or abolish the law, but it interprets it. Contrary to the decisions with which Constitutional court abrogate or vitiate regulations and which make it

"negative legislator", the interpretative decisions give to the Constitutional court characteristics of "positive legislator".[61]

Other important difference between the legal effects of the decisions of the Constitutional Court in RS and RM is that the decisions of the Constitutional Court of RM come into force with the day of their publishing in "Official Gazette of RM", while the Constitutional Court of RS can decide its decision to come into force after expiry of time-limit determined by the Constitutional Court itself (Art. 43 of the Law on Constitutional Court)[62] or to oblige the state body to eliminate identified unconstitutionality within a time-limit set again by the Constitutional Court itself (Art. 48).[63]

Having in mind these characteristics of the Constitutional Court in RM and RS, especially the "standing rules" and legal effects of the decisions of the Constitutional Court in RM, it could be said that it is one of the most powerful and perhaps even most active specimen at its kind in the world. But, in the practice it is not like that. The Constitutional Court has not become "key player" in the constitutional and political system.

As Svetomir Skaric points out, the real role of the Constitutional Court in the protection of human rights depends not only on the legal effect of its decisions. Its role depends essentially on the following factors: the ability of the constitutional judges to adopt the decisions on the basis of developed theoretical awareness for the character and further development of the constitutional order of the country (interpretation of the Constitution in compliance with the liberal democratic theory and the contemporary constitutionalism); second, the valor of judges to impose the rule of law as a frame of the state power (constitutionality control as a legal category); and third, the readiness of the judges to protect the Constitution, not only from formal breaches, but also from all forms of its factual change (verfassungwandlung).[64]

Performing their competencies in evaluation of constitutionality and legality of general legal rules, Constitutional Court in RS and RM most of the times (not always) held opinions which were quite defensible, but not always argued in a sufficiently explicit way to persuade the public. The Constitutional Court of RM has not always avoided political influence when it decided on some cases. But, even when the Constitutional Court managed to act as protector of the Constitution, the government made pressures to "discipline" the members of the Court.

For the Constitutional Court to be honored in their function to protect human rights by their normative violations they should try to represent the "idealism" of the constitutional regulations, in contrast to the "pragmatism" of the other state bodies.

6. Defense of the fundamental rights - constitutional complaint

In many constitutions, the protection of human rights is one of the competences of the Constitutional courts. The Constitutional courts in Austria, Germany, Spain, Hungary, Croatia, Czech Republic, Slovenia[65] have a duty to protect constitutional rights of man and citizens.

In Spain and Germany constitutional complaint (recurso de amparo in Spain and verfassungsbeschwerede in Germany) is of utmost significance and is designed as a means by which Constitutional court can remedy individual violations of any of the fundamental rights defined as such in the constitution.[66]

The writ of amparo, the origins of which go back to the Kingdom of Aragon, is an institution that has been used since the nineteenth century in Latin America. Under that influence recurso de amparo was adopted in the Spanish Constitution of 1931. Now petition of amparo can be invoked against administrative acts and court decisions interfering with fundamental rights.

The constitutional complaints, which are adopted in some of the constitutions, differ in many aspects between themselves.

First is the question against which acts the constitutional complaint can be invoked. For example, in Germany constitutional complaint can be invoked against any and all public powers in the event of the violation of a fundamental right, i.e. constitutional complaint can be raised if some fundamental right is violated by judgment, by an administrative act, or (under certain conditions) by a statute.

In Spain amparo can be invoked against judgment of the courts and administrative acts. Amparo cannot be invoked directly for review of the constitutionality of the statute (unlike constitutional review in Germany), but the chamber of the Constitutional Tribunals that reviews writes of amparo may refer questions on the constitutionality of an underlying statute to the full court.[67]

In Austria constitutional complaint can be invoked only when administrative authorities have violated a particular right, which is guaranteed by a constitutional provision.

The differences between the constitutional complaints in these countries came also from the differences in the procedures for invoking and deciding upon these complaints.

In Austria subject of a petition for protection of fundamental rights is:
- a decree issued by the last instance of the administrative authorities
- an act of immediate command and compulsion by an administrative authority, such as an arrest or a search.

The petition has to be filed within six weeks after a decree was issued or an act of immediate command and compulsion was performed.

So, the formal requirements for invoking the petition are:
- six-week period for the filing of a petition
- petition has to be filed after a decision of the highest authority was made
- a case should fall within the jurisdiction of Constitutional court.

Until 1981 the Constitutional court in Austria was obliged to decide each case with an opinion. The rejection of the petition had to be also accompanied by an opinion. In 1981 by constitutional amendment, the Constitutional court was authorized to refuse a petition “if there is no reasonable

chance of success". To this reason for rejection of the petition, in 1984 a new one was added. Since 1984, Constitutional court has been authorized to refuse a petition when a "decision on the petition cannot be expected to clarify an issue of constitutional law". In such case, a Constitutional court dismisses a petition and can refer the case to the Administrative court.

In Spain any natural or legal person invoking a legitimate interest, as well as the Defender of the People and the Office of Public Prosecutor are entitled to lodge a constitutional complaint (Art. 162).

The constitutional complaint in Spain has subsidiary character. This means that access to constitutional jurisdiction is limited to those complaints, which exist, in the legal system. Subsidiary nature of the procedure upon constitutional complaint places the Constitutional court in a position to be the "judge of judges" (who decide in the cases where a previous judgment has been handed down by another judicial body).[68]

In Hungary, a constitutional complaint can be invoked if the right is violated by the application of an unconstitutional norm. The principal subject matter before the Constitutional court would not be the norm but the act of application of that norm. The constitutional complaint may be invoked in a period of sixty days after the act is issued by the highest instance.

The divergences between the various legal orders providing for a constitutional complaint exist with the regard to the scope of review and type of decision.

For example, in Austria the Constitutional court in constitutional complaints may repeal an ordinance or the law only to the extent it has been expressly pleaded by the complainant, or the court would have had to apply it in the pending suit. But, if the court finds that the ordinance has no foundation in law; was issued by an authority without competence in the matter or was published in a manner contrary to law; shall rescind the whole ordinance as illegal (Art. 139(3)). Also, if the Constitutional court finds the law as a whole to have been promulgated in an unconstitutional manner, it must repeal the whole law, unless such total repeal would operate against the interests of the complainant (Art. 140 (3)).

In Germany the Constitutional court had extended its scope of review not only beyond the fundamental rights claimed by the complainant as having been violated but also to other norms of the constitution or constitutional principles.[69]

The right to the constitutional complaint for protection of some fundamental rights is important mean for human rights protection, but in practice very often it is not so effective. The huge number of constitutional complaints, which are logged to the Constitutional court, constitute a strain on the efficiency of the court and it leads to the situations when court needs a year to deliver a decision upon one complaint.

Constitutional appeal is one of the most important, but in the same time controversial means for the human rights protection. Some ancedents of the jurisdiction of the Constitutional Court in Slovenia and Macedonia to protect fundamental rights could be found in their Constitutions from 1963, which empowered the Constitutional Court to decide on the protection of self-government

rights and other fundamental freedoms and rights specified, by the Federal and member states constitutions; in case when these were violated by an individual act or deed by the state or communal body or company in case this was not guaranteed by other judicial protection by statute. This instrument had no result in the practice. The Constitutional Court rejected individual suits on the basis of an absence of power and directed the plaintiff to the ordinary courts.

The wave of democratization and ideas about human rights protection in countries of the post-communist Europe actualized the need for human rights protection by the Constitutional Court, i.e. the idea of constitutional appeal. The experiences especially from Germany, Austria, and Spain were used as a model for shaping the provisions for constitutional appeal in new constitutions. Aware of the differences between the constitutional appeals in different countries, a definition of the constitutional appeal made by the German author Rüdiger Zuck can be used for evaluation of the existence of this legal instrument. The elements of his definition of the constitutional appeal presented by Ivan Kristan are the following:

- constitutional appeal is special legal mean
- it is legal mean for protection of basic rights
- it is a legal mean directed toward public power, i.e. toward act of all three powers (legislative, executive and judicial)
- the object of protection are all basic rights of the plaintiff, i.e. not only rights of the negative status, which protects the individual from the interference of the state, but also rights of active status, i.e. political rights
- constitutional appeal can be used when the rights of the plaintiff are violated, not when someone else's rights are violated
- the statement of the plaintiff that his fundamental rights are violated is enough for lodging constitutional appeal
- constitutional appeal is only special legal mean and it is not a basic constitutional right by itself.[70]

What is the position of the constitutional appeal in the constitutional systems of RS and RM compared with the elements of this definition? RS is very close to this definition, RM is very far.

Constitutional provisions for constitutional appeal in RS are relatively modest. Its details are regulated by the Law on Constitutional Court. The situation in RM is worse. The Constitution of RM even does not use the term constitutional appeal. The provisions of the Rules for the Procedure of the Constitutional Court of RM use the term "demand".

The Constitution of RS determines that Constitutional Court decides cases of constitutional appeal alleging violations of the human rights and fundamental freedoms by individual acts (Art. 160, para.1 subpara. 6).

The Constitution of RM determines that Constitutional Court protects the freedoms and rights of the individual and citizen relating to the freedom of conviction, conscience, thought and public expression of thought, political association and activity as well as to the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political

affiliation (Art. 110, para.1, subpara.3). It is not clear the criteria on which the "framing fathers" selected only these rights to be protected by the Constitutional Court.

As it could be seen, the first difference between the competence of the Constitutional Court in RS and RM is in the scope of rights that are protected by them. The Constitution of RS uses a general term and gives the Constitutional Court competence to decide on violations of "human rights and fundamental freedoms" by individual acts. This general formulation of that provision has been criticized by some authors.[71]

M. Krivic writes that this formulation, on the one hand could be considered as weakness of the constitutional provisions because it is not very clear which right are protected by the constitutional appeal, but on the other hand it could be considered as advantage because the scope which is protected is elastic and it allows broading of the fields which are protected.[72]

A. Mavcic wrote that the protection by the Constitutional Court embraces all constitutionally guaranteed fundamental human rights and freedoms, including those which adopted through international agreements become part of the national law through ratification.[73]

B.

This does not make the situation perfectly clear because this answer does not cover the question whether the rights, which are not regulated in the Chapter II of the Constitution, are protected by the constitutional appeal or not. The Constitutional Court in its practice refused to recognize that some Articles of the Chapter III contain constitutional rights. Some cases are already pointed out in the part devoted to the conceptions of human rights in the constitutions of RS and RM.

But the Constitutional Court of RS in its Resolution Up-38/93 recognized the right to citizenship regulated in Art. 13 of the Constitutional Law for Implementing the Basic Charter on the Sovereignty and Independence of the Republic of Slovenia, as constitutionally guaranteed right and accepted the constitutional appeal.

The practice of the Constitutional Court has given the answer that violations of the general constitutional principles cannot be protected by the constitutional appeal. In Resolution on the case Up-13/92 the Constitutional Court did not accept the constitutional appeal because the general constitutional "principles do not make part of human rights or fundamental freedoms. For a constitutional appeal may only be lodged in case of violation of the said rights and freedoms, but not in the event of violation of general constitutional principles."

The court has also stated that it does not have competence to consider whether in the process of reaching its decision the regular court has applied substantive and procedural law as appropriate, because the Constitutional Court is not the appellate tribunal with respect to inferior courts (Up-109/94).

According to the Law on Constitutional Court, any person who believes that his human rights and basic freedoms have been violated by a particular act of a state body, local community or statutory authority and human rights ombudsman when it is directly connected with a particular issue with which he deals have active legitimation for lodging constitutional appeal in RS (Art. 50). The Constitutional Court interpreted this provision as it recognizes active legitimation not

only to natural, but also to legal persons. In the Resolution on the case 10/93 the court reasoned that the "holders of constitutional rights are both natural and legal persons. But this is true of the latter only in so far as individual rights by their nature apply to them."[74]

In some other Resolutions the Constitutional Court of RS elaborated conditions of active legitimation for lodging constitutional appeal.

"Any person requesting legal protection of his rights and legal interests must demonstrate a legal interest: he must demonstrate the likelihood that, if his request was granted he would derive a special legal advantage which he would otherwise be unable to achieve. A plaintiff must thus demonstrate a legal interest in lodging a constitutional appeal as a legal remedy for the protection of human rights and fundamental freedoms", reasoned the Constitutional Court in the Resolution Up-29/93. An organization, which does not have the authorization to represent its members, has no legal standing to lodge a constitutional appeal (Up-66/94).

In RM, according to the Rules of the Procedure of the Constitutional Court, every citizen who believes that any of the rights enumerated in the Art. 110, para.1, subpara.3, is violated by individual act or activity, has active legitimation to ask a protection of that right. This provision is very restrictive because it allows "legal standing" only to citizens, not to every person. The legal persons are excluded with this provision but also with the character of the rights, which are protected. The citizen may demand protection of his rights, and not for rights of other person (Resolution U. No., 29/97).

The subject matter of a demand for protection of some of the enumerated rights before the Constitutional Court of RM is individual act or activity. Procedural conditions stated in Art. 51 of the Rules of the Procedure of the Constitutional Court of RM are: that the demand for protection of the right should be submitted in the period of two months from the day of the final legally valid individual act, or of the day when the citizen found out about the activity, but not later than five years. From this provision which establishes subjective and objective terms is derived the conclusion that "the Constitutional Court can carry out direct protection of the mentioned freedoms and rights only if they are violated by a final individual act of an ordinary court".[75]

The Constitutional Court in a Resolution U.no.168/97 stated that it "decides for protection of freedoms and rights violated by final and legally valid act, and the act of the Public prosecutor is not an act which is final or legally valid individual act which decides on freedoms and rights, i.e. which revokes or limits some freedoms and rights."[76]

The similar Resolution about the Public Prosecutor was issued by the Constitutional Court of RS is case Up-35/93: "It is not possible to lodge a constitutional appeal against a document, which is claimed to have violated human right or fundamental freedom. The impugned records of the Public prosecutor's office are not individual legal acts since nothing is decided by them about any of the plaintiff's rights or obligations."

The subject -matter of a constitutional appeal in RS is an individual act[77] of a state body, local community body or statutory authority.

Procedural requirements for lodging constitutional appeal are exhaustion of legal remedies. But, before all extraordinary legal means have been exhausted, the Constitutional Court may exceptionally decide on a constitutional appeal if a violation is probable and if certain irreparable consequences would occur appellant as a result of the implementation of a particular act (Art. 51 of the Law on the Constitutional Court).

The Constitutional Court cannot accept into decision a constitutional appeal if reasons for extraordinary ruling on the constitutional appeal prior to the exhaustion of legal remedies do not exist, especially if the plaintiff has not supplemented the accusation with evidence of the obviousness of the alleged violation despite being called upon by the court to do so and since it was established that the consequences may be remedied should the plaintiff be successful with the legal remedy and should the ruling differ from the one that currently stands (Up-44/93).

A constitutional appeal shall be lodged within 60 days after the day of the acceptance of a particular act against a constitutional appeal is permitted. In specially founded cases the Constitutional Court may exceptionally decide on the constitutional appeal, which has been lodged after that time limit. This time must be deemed to begin to run on the date of delivery of the personal act issued in reference with the last legal remedy filed (Up-78/94).

The constitutional appeal in RS and demand for protection of some rights in RM must indicate particular act, which is subject of the appeal and facts of the alleged violation of human rights.

The procedure for examining a constitutional appeal in RS starts with a ruling on whether to accept a constitutional appeal and begin proceedings made by the Constitutional Court in senate of three judges at a session closed to the public.

The rejection or acceptance of a constitutional appeal shall be decided upon unanimously by the senate. This ruling is final, if a constitutional appeal was not accepted by the senate. It shall nevertheless be accepted if such is the written decision of any group of three judges of the Constitutional Court within 15 days after the initial decisions.

The Rules of the Procedure of the Constitutional Court of RM does not contain any provisions about procedure for deciding on allowability of the demand for protection of human rights.

The provisions of this act only regulate that the demand for protection of human rights shall be sent to the body, which issued the individual act, i.e. the body that made the activity in the period of 3 days of the day when the demand is accepted. This body should reply in a period of 15 days. The Slovenian Law on Constitutional Court contains the same provision, but it does not specify the terms for that.

The accepted constitutional appeal is discussed by the Constitutional Court usually at an in camera session, but also possibly at a public hearing in RS, and “as a rule, at public hearing” in RM on which the participants in the procedure, the Ombudsman, and if needed some other persons and bodies are invited. The public hearing may be held even if some of the participants in the procedure or Ombudsman are not present, if they are regularly invited.

During the procedure the senate or the Constitutional Court of RS and the Constitutional Court of RM may suspend the implementation of the particular act, which is subject of appeal. The Law on Constitutional Court of RS specifies that it could happen if the implementation of that act would cause irreparable damage. The Constitutional Court of RS may also suspend the implementation of a certain law or other regulation or general act for the exercise of public authority, on the basis of which the individual act was adopted.

The decisions in merito of the Constitutional Court of RS may be following:
- the Constitutional Court may issue a decision declaring that the constitutional appeal was unfounded
- may accept the constitutional appeal and partly or completely abrogate (ex tunc) or vitiate (ex nunc) the act that was the subject of the appeal, and return the matter to the competent body
- may abrogate or vitiate a general act which was base for issuing an abolished individual act
- may decide on a contested right or freedom if such procedure is necessary in order to abolish consequences that have already occurred on the basis of the individual act, or if such is the nature of the constitutional right or freedom, and if a decision can be reached on the basis of information in the record.

The Constitutional Court of RM may:
- issue a decision declaring that the demand was unfounded
- abrogate (ex tunc) or vitiate (ex nunc) the individual act
- prohibit the activity by which human rights were violated.

Having in mind the already presented characteristics of the constitutional appeal in RS and the demand for protection of enumerated human rights by the Constitutional Court of RM; as well as considering the characteristics of the constitutional appeal in Germany, Austria and Spain, the question of the "particularities" of the Slovenian and Macedonian models can be asked.

- The subject-matter of the constitutional appeal in RS is individual acts; in RM -individual acts and activities; in Spain also individual acts, acts of the Parliament (except laws), acts of the executive bodies and of the judicial bodies; in Austria only individual acts of the administration and not of the Court (not judgments) and in Germany- all kinds of acts including laws.
- The scope of rights that are protected - in RS there is general provision for that; in RM - very restrictively only few rights are enumerated; in Germany and Spain the rights (articles) are precisely determined.
- Exceptions from precondition of all remedies having previously been exhausted is characteristic of Slovenian system.
- M. Krivic points out another difference between the German and the Slovenian constitutional appeal. German constitutional appeal protects from interference by public power, while for Slovenia it is not perfectly clear whether "individual acts" which are subject-matter of the constitutional appeal are only individual acts of the public power, or it includes the private legal acts (contracts) which violate human rights.78
- Characteristic of the Slovenian system compared with Macedonian is that its Constitutional Court works in senates, while Macedonian court works in plenum.
- Public hearings are characteristic of the work of the Constitutional Court of RM.

But its biggest weakness of the competence of the Constitutional Court of RM is its very limited scope of rights, which are protected. That can lead us to the conclusion that in RM there is no constitutional appeal, which fulfills the conditions (elements) of the definition stated at the beginning.

Such restricted competence of the Constitutional Court of RM resulted in very small number of demands received.

From 1992 till 2000 the Constitutional Court of RM received and decided 73 demands. 55 of them were rejected for different reasons (most of them were rejected because the Constitutional Court was not competent for protection of that right; then because the objective and subjective term were not respected; because the Constitutional Court was not competent to decide on violations of rights by that kind of acts; because the Constitutional Court has already decided on the same demand). In 16 cases the Constitutional Court decided in merito and all demands were unfounded.

The Constitutional Court of RS received 1833 constitutional appeals from 1992 to 1999. 1338 were decided. Only 125 were decided positively.

Expressed in years these numbers look like this:

Constitutional appeals in RS

Year	Received	Decided	From that positively decided
1992	29	2	1
1003	48	-	-
1994	121	48	2
1995	205	134	10
1996	351	230	12
1997	376	328	26
1998	355	297	33
1999	348	319	42
total	1833	1338	125

Demands for protection of human rights in RM

Year	Received	Decided
1992	6	5
1993	9	8
1994	3	5
1995	3	1
1996	7	7
1997	9	11
1998	8	8
1999	19	16
2000	9	12
total	73	73

These numbers show that constitutional appeal is much more used in RS than in RM. That is first of all because the constitutional appeal in RS protects all constitutional rights and in RM only few rights. The restricted competence of the Constitutional Court of RM liberated it from too many demands for human rights protection and gives the court chance to concentrate itself to its "main" function - evaluation of constitutionality and legality of general legal rules. But on other side it takes away from the persons (in RM citizens) one very powerful and important instrument for human rights protection. And legal means for human rights protection are never enough or too much.

In Slovenia the number of received constitutional appeals is increasing which shows that it is used "as a kind of highest instance of the Court" when all legal remedies are exhausted. The bid number of constitutional appeal speaks that Constitutional Court is respected and trusted as one of the guarantees and protectors of the constitutional rights. The evaluations of the work of the Constitutional Court in the legal literature are predominantly positive.

After expressing the weaknesses of some decisions of the Constitutional Court in which restrictive interpretations of rights and the Constitution were applied, the authors points that "the Constitutional Court in that segment of legal protection fulfills its competencies with a quality."[79] The work of the Constitutional Court in deciding constitutional appeals is not easy. It is difficult and with lot of responsibilities. The Constitutional Court is facing problems with big number of constitutional appeals and with its understanding as final judicial instance which leads toward misuse of this legal instrument.80

On the other side, the low number of cases decided positively in RS shows that there should be satisfaction of the work of the ordinary Court. The fact that too many demands for protection of some rights in RM were rejected because the court was not competent for protection of that right

shows the need for broadening of court's competencies. The 16 cases, which were decided in merito, were decided satisfactory.

7. Few more remarks on the role of the Constitutional Court of the Republic of Macedonia in the human rights protection

The constitutional provisions about the Constitutional Court of RS and the Constitutional Court of RM are very modest and in some sense general. The Law on Constitutional Court of RS and the Rules of the Procedure of the Constitutional Court of RS contain precise and satisfactory provisions for regulating its position and competencies. The legislative power in RM till now failed to regulate the position of the Constitutional Court by law. The Constitutional Court filled that gap with its Rules of the Procedure.

The Constitutional Courts in both countries had difficult jobs in the previous period, because the legal system was changing radically, but old laws were still in force. But they managed to deal with that situation by adopting decisions, which were mostly approved by the public.

Miro Cerar points out that generally it is possible to speak that in this previous period the Constitutional Court in RS was "successful" in broadening of its activities and in performing its abstract constitutional competencies, compared with the Parliament, Government and the regular courts. When bigger number of constitutional arguments on many questions were missing, it is easy the judicial power without democratic control and clearly defined limits to become obstinate. That resulted according to M. Cerar in two politically motivated decisions of the Constitutional Court: U-I-12/97 - about the electoral referendum and the Decision U-I-301/98 - about unconstitutionality of municipality Koper. That made moral and professional authority of the Constitutional Court lower.[81]

Such political decisions, which affected authority of the Constitutional Court, were also present in RM. The Constitutional Court of RM did not have high professional authority in the previous period. Till now the Constitutional Court of RM was very self-constrained in its activities. Although legally it has the right to start procedures ex officio, the Constitutional Court used this right very rare.

The explanations of its decisions were not elaborate, argumented and suggestive.

The Constitutional Court of RM also did not try to base its decisions on the general constitutional principles and to concretize their content.

It seems that the Constitutional Courts in both countries have not used or consulted experiences of the practice of the Constitutional Courts in developed democracies, as well as the practice of the European court of human rights.

But generally speaking, the Constitutional Courts in both countries with their activities, in evaluation of the constitutionality and legality, as well with their activities connected with the

constitutional appeals and demands, played positive role in the constitutional development of these countries and in the human rights protection.

ENDNOTES

1. M.J.C. Vile, "Constitutionalism and the Separation of Powers", Oxford, 1967, Preface, p. V.
2. There is also another conception which does not deny that government can and often do pose a threat to the human rights and freedoms, but it also regards the government as a possible source (underlined by R.T.) of liberty, which create conditions which enable human persons to enjoy greater liberty than they otherwise would. See in Joseph Raz, "The Morality of Freedom", Oxford: Clarendon Press, 1988, p.18.
3. Walter Murphy, "Constitutions, Constitutionalism and Democracy" in D. Greenberg and others (eds.), "Constitutionalism and Democracy", Oxford: OUP, 1993, pp.3-25.
4. Thomas C. Grey, "Constitutionalism: An Analytic Framework" in J.W. Chapman and J. R. Pennock, "Constitutionalism", New York, 1979, p.189.
5. Government is arbitrary if it has any or all of four characteristics:
-if it gives effect to unconstrained will of the rulers
-if it does not treat people consistently
-if it is unpredictable
-if its actions depart from the reason of the law.
So, government is arbitrary if it lacks constraint, consistency, or certainty. See Thimoty A. O. Endicott, "The Impossibility of the Rule of Law", Oxford Journal of Legal Studies, vol. 19, 1999, p.3.
6. Stephen Holmes laments that the metaphors of checking, blocking, and restraining have given a constitutionalism a bad name. He urges that instead, the role of constitutionalism is generating new practices and possibilities, in enabling the electorate to have a coherent will, be considered. See Michael C. Davis, "The Price of Rights: Constitutionalism and East Asian Economic Development", Human Rights Quarterly, vol.20/1998, p. 325. For a recent discussion on "negative" and "enabling" constitutionalism see: S. Holmes, "Passions and Constraint. On the Theory of Liberal Democracy", Chicago: University of Chicago, 1995.
7. Donald P. Kommers and W.J. Thompson, "Fundamentals in the Liberal Constitutional Tradition" in Joachim Jens Hesse and Nevil Jonhson (eds.), "Constitutional Policy and Change in Europe", Oxford: Oxford University Press, 1995, p. 23-24.
8. Claus Offe, "Democracy Against Welfare State? Structural Foundations of Neoconservative Political Opportunities" in J. Donald Moon (ed.), "Responsibility, Rights and Welfare: The Theory of Welfare State", Boulder: Westview Press, 1989, p.189.
9. Lidija R. Basta, "Politika u granicama prava - Studija o anglosaksonskom konstitucionalizmu", Beograd: Istracivacko-izdavacki centar Sso Srbije i Institut za uporedno pravo, 1984, p.153.
10. Carla M. Zoethout and Piet J. Boon, "Defining Constitutionalism and Democracy: An Introduction" in "Constitutionalism in Africa - A Quest for Autochthonous Principles", Sanders Institut, 1996, p. 4.
11. W. G. Andrews, "Constitutions and Constitutionalism", Princeton, New Jersey, Toronto, London, New York, 1963, p.13.

12. J. Morison, “Crisis and Control: A ‘New Constitutionalism’ for the United Kingdom from Northern Ireland?” in Carla M. Zoethout, Ger van der Tand and Piet Akkermans (eds.), “Control in Constitutional Law”, Martinus Nijhoff Publishers, p. 3-21.
13.Ulrich Karpen (ed.), “The Constitution of the Federal Republic of Germany - Essays on the Basic Rights and Principles of the Basic Law with Translation of the Basic Law”, Baden-Baden: Nomos Verlagsgesellschaft, 1988, p.170.
14. For that see: Jan-Eric Lane, “Constitutionalism and Political Theory”, Manchester and New York: Manchester University Press, 1996, pp. 50, 263; Carla M. Zoethout and Piet J. Boon, “Defining Constitutionalism and Democracy: An Introduction” in “Constitutionalism in Africa - A Quest for Autochthonous Principles”, Sanders Institut, 1996, pp. 5-6; A. E. Dick Howard, “The Essence of Constitutionalism” in Kenneth W. Thompson and Rett R. Ludwikowski (eds.), “Constitutionalism and Human Rights: America, Poland, and France”, University Press of America, 1991, pp.18-30; R. P. Peerenboom, “What is Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics”, Harvard Human Rights Journal, Vol.6/1993, p. 34; Michael C. Davis, “The Price of Rights: Constitutionalism and East Asian Economic Development”, Human Rights Quarterly, vol.20/1998, p. 307; Vojislav Stanovcic, “Konstitucionalizam i ljudska prava u Istocnoj Evropi”, ARHIV,1-2/1990, p. 394; A. E. Dick Howard, “Demokratijata v zori“ in “(Na)vrakanje kon demokratijata“, Makedonsko radio - Treta programa, Skopje, br.47-48,pp.107-109 .
15.Joseph Raz, “The Morality of Freedom”, Oxford: Clarendon Press, 1988, p. 19.
16.Since the basic laws of the Greek polis until today people concern the relationship of the state’s fundamental organs and its institutions. If the principles of constitutionalism are kept in mind during the process of creating that arrangement, these relations establish a system of limits that allow the concept of human rights to prevail.
17.Virginia’s Declaration of Rights of 1776.
18.A. E. Dick Howard, “The Essence of Constitutionalism” in Kenneth W. Thompson and Rett R. Ludwikowski (eds.), “Constitutionalism and Human Rights: America, Poland, and France”, University Press of America, 1991, pp.18.
19.Carla M. Zoethout and Piet J. Boon, “Defining Constitutionalism and Democracy: An Introduction” in “Constitutionalism in Africa - A Quest for Autochthonous Principles”, Sanders Institut, 1996, p. 4.
20. Simply as an analytical matter, wholesale rejection of the constitutionalism necessarily entails rejection of rights because one element of constitutionalism is individual rights. See: R. P. Peerenboom, “What is Wrong with Chinese Rights?: Toward a Theory of Rights with Chinese Characteristics”, Harvard Human Rights Journal, Vol.6/1993, p. 35.
21.The concept of rule of law, and not the Rechtsstaat (juridical state) is inherent in the constitutionalism. J. La Palombara wrote: “the difference between the Rechsstaat and constitutionalism is that the rule of law in former is based on the concession from the rules. The concession implies that the state has elected to engage in self-limitation in the exercise of power. But under constitutionalism the limitation is found to be a matter of right established by a combination of historical tradition and philosophical principle. While the distinction may sound legalistic, its impact is very real. It is like the contrast between an all-powerful father, who from time to time may refrain from tyrannizing over his children and even give them certain areas of freedom and independence to act, and a family where certain areas of freedom to act and take decisions are claimed and accepted as inherent in the family members”. J. La Palombara, “Politics Within Nations”, Englewood Cliffs, 1974, p.106. More about the difference between

rule of law and juridical state see in Harold J. Berman, "the Struggle for Law in Post-Soviet Russia" in Andràs Sajó (ed.), "Western Rights? Post-Communist Application", Kluwer Law International, 1996, pp. 41-55.
22.See the definitions in Geoffrey de Q. Walker, "The Rule of Law - Foundations of Constitutional Democracy", Melbourne University Press, 1988.
23.Ulrich Karpen (ed.), "The Constitution of the Federal Republic of Germany - Essays on the Basic Rights and Principles of the Basic Law with Translation of the Basic Law", Baden-Baden: Nomos Verlagsgesellschaft, 1988, p.173.
24.W. Friedmann argues that "Dicey`s formulation of the rule of law is no longer acceptable, since it equates the rule of law with the absence not only of arbitrary, but even of 'wide discretionary' power." According to him, "The weaknesses of Dicey`s conception are magnified in the modern reformulation of the rule of law by Hayek, which: (a) identifies the rule of law with the economic and political philosophy of lassez faire, and (b) is predicated on the fixity of legal rules, and the corresponding absence of judicial discretion." W. Friedmann, "Law in Changing Society", Baltimore, Maryland: Penguin Books, 1964, p.374.
25.See Jan-Eric Lane, "Constitutions and Political Theory", Manchester and New York: Manchester University Press, 1996, pp.44.
26.F.A. Hayek, "The Constitution of Liberty", London: Routledge, 1993, p.181.
27. "Constitutionalism is an effort to create social institutions that stabilize the social world by placing the definition of the social order beyond willful transformation." See Mark Tushnet, "Constitutionalism and Critical Legal Studies" in Alan Rosebaum (ed.), "Constitutionalism - The Philosophical Dimension", New York, Westport, Connecticut, London: Greenwood, 1988, p.151.
28.J. Elster and R. Slagstad (eds.), "Constitutionalism and Democracy", Chambridge University Press, 1988, p.2
29.Walter F. Murphy, James E. Fleming and Sotirios A. Baber, "American Constitutional Interpretation", Westbury, New York: The Foundation Press, Inc., 1995, p.45
30.Jonathan D. Varat, "Reflections on the Establishment of Constitutional Government in Eastern Europe", Constitutional commentary, The University of Minnesota Law School, No. 1/1992, p.174.
31."The Federalist", Middletown: Wesleyan University Press, 1961, No.22, p.146.
32.Lawrence Tribe, "American Constitutional Law", Mineola, 1978, p. 9.
33.F.A. Hayek, "The Constitution of Liberty", Routledge, 1993, pp. 180-182.
34."A commitment to long-term principles", wrote Hayek, "in fact, gives the people more control over the general nature of the political order than they would possess if its character were to be determined solely by successive decisions of particular issues. A free society certainly needs permanent means of restricting the powers of government, no matter what the particular objective of the moment may be." See: F.A. Hayek, "The Constitution of Liberty", Routledge, 1993, p. 182.
35.F.A. Hayek, "The Constitution of Liberty", Routledge, 1993, pp. 180.
36."Democracy theorists have underlined different properties of democracy: participation (Rousseau), representation (Mill), check and balances (Madison), élite competition (Schumpeter), contestation (Dahl), decentralization (Tocqueville), equality (Marx) and freedom (Hayek). Perhaps the well-known Lincoln's definition captures the various dimensions in the concept of democracy: government by people of people for people". Jan-Eric Lane,

"Constitutions and Political Theory", Manchester and New York: Manchester University Press, 1996, p. 244.
37.James McGregor Burns, J. W. Peltason and Thomas E. Cronin, "Government by the People", New Jersey: Prentice Hall, Englewood Cliffs, 1989, p.4. Jan-Erik Lane wrote "historically, the constitutional state emerged before the democratic state. It is true that there existed constitutional monarchies in Europe as well as constitutional republican states before democratic institutions were introduced in a complete fashion." See: Jan-Eric Lane, "Constitutions and Political Theory", Manchester and New York: Manchester University Press, 1996, p. 263.
38.Judit Squires, "Liberal constitutionalism, Identity and Difference" in Richard Bellamy and Dario Castiglione (eds.), "Constitutionalism in Transformation: European and Theoretical Perspectives", Oxford: Blackwell Publishers, 1996, p. 209.
39.Jan-Eric Lane, "Constitutions and Political Theory", Manchester and New York: Manchester University Press, 1996, p. 264.
40.See: S. S. Wolin, "The Presence of the Past - Essays on the State and the Constitution", Baltimore: John Hopkins University Press, 1990.
41.J. A. Rohr, "To Run a Constitution. The Legitimacy of the Administrative State", Lawrence, Kansas: The University Press of Kansas, 1986. According to Jan-Eric Lane, "Constitutions and Political Theory", Manchester and New York: Manchester University Press, 1996, p. 263.
42. Walter F. Murphy, James E. Fleming and Sotirios A. Baber, "American Constitutional Interpretation", Westbury, New York: The Foundation Press, Inc., 1995, p.53.
43. Quotations from John Elster, "Constitution-making in Eastern Europe: Rebuilding the Boat in the Open Sea" in Joachim Jens Hesse (ed.), "Administrative Transformation in Central and Eastern Europe", Oxford: Blackwell, 1993, p. 175.
44. I. Joung, "Justice and Politics of Difference", Princeton: Princeton University Press, 1990, pp. 93-94. Quoted in Judit Squires, "Liberal constitutionalism, Identity and Difference" in Richard Bellamy and Dario Castiglione (eds.), "Constitutionalism in Transformation: European and Theoretical Perspectives", Oxford: Blackwell Publishers, 1996, p. 220.
45. Michael C. Davis, "The Price of Rights: Constitutionalism and East Asian Economic Development", Human Rights Quarterly, vol.20/1998, p. 325.
46."…Constitutionalism is not an enemy of democracy, though it does not adulate it. According to Leo Strauss, "…the reason why we cannot allow ourselves to be bootlickers of democracy is because we are its friends and allies." András Sajó, "Limiting Government - An Introduction to Constitutionalism", Budapest, New York: Central European University Press, 1999, pp.53-54.
47. The critics of Constitutional court "described it as the deadly lightening which the court would send, as Jove from his throne, to kill laws that according to democratic rules embody the will of the people". See: Antonio La Pergola, "Introductory statement" in "The role of the Constitutional court in the consolidation of the rule of law - Proceedings of the UniDem Seminar organized in Budapest on 8-10 June 1994", Strasbourg: Council of Europe Press, 1994, p. 12.
48. Leszek Galicki, "The Influence of American Constitutional Ideas on the Development of Constitutionalism in Poland and Eastern Europe" in Kenneth W. Thompson and Rett R. Ludwikowski "Constitutionalism and Human Rights: America, Poland, and France - A Bicentennial Colloquium of the Miller Center", London: University Press of America, 1991, p.
49. In his conclusion to an international colloquium on European constitutional courts, Jean Rivero suggested that "At that time (before World War II), constitutional review was for public law like Western and American comedy for movies - an American specialty". Quoted in Louis Favoreau, "Constitutional Review in Europe" in Louis Henkin and Albert J. Rosenthal (eds.),

"Constitutionalism and Rights - the Influence of the U.S. Constitutions Abroad", New York: Colombia University Press, 1990, p. 40.
49. See: Mark Brzezinski, "The Struggle for Constitutionalism in Poland", Oxford: St Anthony's College, 1998, p. 18
50. Helmult Steinberger, "Decisions of the Constitutional court and their effects: in "The role of the Constitutional court in the consolidation of the rule of law -Proceedings of the UniDem Seminar organized in Budapest on 8-10 June 1994", Strasbourg: Council of Europe Press, 1994, p. 79.
51. Helmult Steinberger, "Decisions of the Constitutional court and their effects: in "The role of the Constitutional court in the consolidation of the rule of law -Proceedings of the UniDem Seminar organized in Budapest on 8-10 June 1994", Strasbourg: Council of Europe Press, 1994, p. 90
52. Giancarlo Rolla and Tania Groppi, "Between politics and the law: the developments of constitutional review in Italy", paper on the Vth World Congress on Constitutional Law, Rotterdam, 1999, p. 3.
53.According to the Constitution of RM the Assembly decides on issuing notice of referendum concerning specific matters within its sphere of competence. The Assembly is obliged to issue notice of referendum if one is proposed by at least 150 000 voters. In 1996, 150 000 voters demanded by the Assembly to issue a notice of referendum on the question: "Are you for pre-term elections for representatives in the Assembly of RM, which would be held at the end of 1996?" The Assembly did not accept this initiative with the explanation that it can issue a notice of referendum concerning specific matters within its sphere of competence, and not for pre-term elections. There was initiative sent to the Constitutional Courts for deciding on constitutionality of this Conclusion of the Assembly.
54.See Resolution of the Constitutional Courts of RM, No. 1290, Official Gazette of RM, No. 70/96.
55. See Matevž Krivic, "Ustavno sodisce: pristojnosti in postopek" in Marijan Pavcnik and Arne Mavcic (eds.), "Ustavno sodstvo", Cankarjeva zalozba, Ljubljana, 2000, p. 72.
56. See Resolution U-I-210/93-19; U-I-300/94
57. See Resolutions: U.no.167/96; 129/96; 22/96; 165/96; 82/97 etc.
58. According to Krivic, courts had used this right 12 times, Public Prosecutor 7, Ombudsman 3, court of accounts 1 and Bank of Slovenia never. See: Matevz Krivic, "Ustavno sodisce: pristojnosti in postopek" in Marijan Pavcnik and Arne Mavcic (eds.), "Ustavno sodstvo", Cankarjeva zalozba, Ljubljana, 2000, p. 106.
59. For example see: Decision U.no.206/94 (The Law on Protection and Usage of Farming Land); Decision U. no. 81/95 (The Law on Operating and Managing of the Amenity Enterprises with Special Public Interest).
60. Matevz Krivic criticizes the provisions of the Law on Constitutional Courts of RS, which regulate procedure for examining initiative and preparation procedures. More see: Matevz Krivic, "Ustavno sodisce: pristojnosti in postopek" in Marijan Pavcnik and Arne Mavcic (eds.), "Ustavno sodstvo", Cankarjeva zalozba, Ljubljana, 2000, p. 97.
61. Igor Kaucic and Franc Grad, "Ustavna ureditev Slovenije", Gospodarski vestnik, Ljubljana, 2000, p. 313.
62. As examples of such decisions see: U-I-92/93; U-I-154/94-3
63. As examples of such decisions see: U-I-77/94-12; U-I-17/94; U-I-104/92; U-I-125/92; U-I-183/94.

64. Svetomir Skarich, “Constitutional Court of the Republic of Macedonia” in Guiseppe de Vergottini (ed.), “Giustizia constitutionale e sviluppo democraticonei paesi dell Evropa Centr-orientale”, Torina, 2000, p. 177; Svetomir [kari}, “Makedonija na site kontinenti - mir, demokratija, geopolitika”, Union trejd, Skopje, 2000, p. 436.
65. It must be said that all these constitutions contain very few provisions devoted to the Constitutional court and its regulation is made by the statutes, or Rules for Proceeding of the Constitutional court.
66. See: Luis Lopez Guerra, “The Role and Competences of the Constitutional court” in “The role of the Constitutional court in the consolidation of the rule of law -Proceedings of the UniDem Seminar organized in Budapest on 8-10 June 1994”, Strasbourg: Council of Europe Press, 1994, p. 29.
67. See: Louis Favoreau, “Constitutional Review in Europe” in Louis Henkin and Albert J. Rosenthal (eds.), “Constitutionalism and Rights - the Influence of the U.S. Constitutions Abroad”, New York: Colombia University Press, 1990, p. 54.
68. See: Luis Lopez Guerra, “The Role and Competences of the Constitutional court” in “The role of the Constitutional court in the consolidation of the rule of law -Proceedings of the UniDem Seminar organized in Budapest on 8-10 June 1994”, Strasbourg: Council of Europe Press, 1994, p. 31.
69. Helmult Steinberger, “Decisions of the Constitutional court and their effects: in “The role of the Constitutional court in the consolidation of the rule of law -Proceedings of the UniDem Seminar organized in Budapest on 8-10 June 1994”, Strasbourg: Council of Europe Press, 1994, p. 96.
70. Ivan Kristan, “Ustavna priozba” in “Slovenija in Evropska Konvencija o clovekovih pravicah”, Zbornik razprav, Svet za varstvo clovekovih pravic in temeljnih svoboscine, Ljubljana, 1993, p. 121; Ivan Kristan, “Ustavno sodstvo” in Franc Grad, Igor Kaucic, Ciril Ribicic and Ivan Kristan, “Drzavna ureditev Slovenije”, Uradni list Republike Slovenije, Ljubljana, 1999, p. 214; Ivan Kristan, “Ustavna pritozba”, Pravnik, Ljubljana, Let. 47 (1992) 6-8, p. 211.
71. Janez Kranjc writes that such uncertainty of the object of protection by the Constitutional Courts on the basis of the constitutional appeal moves away the Constitutional Courts from its premiere competence: to protect constitutional order. See: Janez Kranjc, “Ustavna pritozba kot institut varstva clovekovih pravic” in Marjan Pavcnik, Ada Polajnar -Pavcnik and Dragica Wedam-Lukic (eds.), “Temeljne pravice”, Cankarjeva zalozba, Ljubljana, 1997, p.387.
72. Matevz Krivic, “Ustavno sodisce: pristojnosti in postopek” in Marijan Pavcnik and Arne Mavcic (eds.), “Ustavno sodstvo”, Cankarjeva zalozba, Ljubljana, 2000, p. 169.
73. Arne Mavcic, “The Specialties of Slovenian Constitutional Review - as compared with the current systems of such review in the new democracies” in Guiseppe de Vergottini (ed.), “Giustizia constitutionale e sviluppo democraticonei paesi dell Evropa Centr-orientale”, Torina, 2000, pp. 179-180.
74. “It is in particular not possible to make any difference between natural and legal persons from the point of view of property. In as far as property is concerned, the constitutional rights of a legal person as such (as the whole) are protected.” See: Resolution Up-10/93.
75. Svetomir Skarich, “Constitutional Court of the Republic of Macedonia” in Guiseppe de Vergottini (ed.), “Giustizia constitutionale e sviluppo democraticonei paesi dell Evropa Centr-orientale”, Torina, 2000, p. 143.

76. The Constitutional Courts also rejected the demand for human rights protection with the Resolution No. 111/99 with explanation that the Agreement between the Faculty of Law and the student for paying scholarship and the Announcements for enrollment of students in First year of the Faculties of the "Ss.Kiril and Metodij" University for 1997/98, as well as the Resolution of the Ministry of Education of 14 June 1996 are not individual or final acts which violate right of the citizens. Another demand which was rejected because the Constitutional Courts is not competent to decide for violation of rights by some acts was the demand lodged for protection of women from discrimination during concluding religious marriage. The Constitutional Courts decided that it lacks competence to decide on violation of rights by religious books (U. no. 32/96).
77. Resolution Up-35/93.
78. Matevz Krivic, "Ustavno sodisce: pristojnosti in postopek" in Marijan Pavcnik and Arne Mavcic (eds.), "Ustavno sodstvo", Cankarjeva zalozba, Ljubljana, 2000, p. 169.
79. Janez Kranjc, "Ustavna pritozba kot institut varstva clovekovih pravic" in Marjan Pavcnik, Ada Polajnar -Pavcnik and Dragica Wedam-Lukic (eds.), "Temeljne pravice", Cankarjeva zalozba, Ljubljana, 1997, p.401.
80. Janez Kranjc, "Ustavna pritozba kot institut varstva clovekovih pravic" in Marjan Pavcnik, Ada Polajnar -Pavcnik and Dragica Wedam-Lukic (eds.), "Temeljne pravice", Cankarjeva zalozba, Ljubljana, 1997, p.401.
81. Miro Cerar, "(Ne)politicnost ustavnega sodstva" in Marijan Pavcnik and Arne Mavcic (eds.), "Ustavno sodstvo", Cankarjeva zalozba, Ljubljana, 2000, p. 375.

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