

Constitutional Court and its position as a negative legislator

Kosovo – 24 October 2023

Honorable colleagues and guests,

At first, please allow me to congratulate the President and judges of the Constitutional Court of Kosovo, on my personal behalf and also on behalf of all the judges of the Constitutional Court of Albania, for the excellent organization of these events, and to express my distinguished pleasure and appreciation for the very good relations of cooperation that exist between our constitutional courts.

Role of the Constitutional Court

The most important and common role of Constitutional Courts has been developed in relation to legislation, during the abstract review of its compatibility with the constitutional norms and principles. The authority to remove from legal order the legal provisions that are incompatible with the Constitution defines the position of this court as a negative legislator (from the Kelsenian point of view) recognizing to the positive legislator (the Parliament) the other duties related to implementation of constitutional principles, by means of approximation of legislation and acting in compliance with the Court's decision.

However, due to the increasing role of constitutional courts not only as guarantors of supremacy of the Constitution, but also as the final interpreters of constitutional norms through decisions that have binding effects on ordinary courts, public institutions and individuals, it could be taken as fact that binominal unconstitutionality-invalidity/nullity that initially marked the activity as “negative legislator” has been overcome. During this period, the competencies of constitutional courts have been progressively extended, taking a more active role in interpreting the Constitution, and the laws adopted on the basis of and pursuant to the latter, in order not only to repeal or not apply them when being unconstitutional, but also to interpret them, if possible, by attaching a meaning that is in harmony with the Constitution, aiming to protect the activity of the lawmaker and the normative acts approved by it.

Lawmaker as interpreter of the constitutional norm

Based on the principle of presumption of constitutionality of the law, the Court through its jurisprudence has upheld in its case law that it has no authority to control the intentions and fairness of solutions applied by the lawmaker. This implies that, with regard to the alleged unconstitutionality, convincing arguments should be submitted in order to enable it (the Court) to evaluate whether the applied legal solutions violate the constitutional norms and values. As the highest representative body and holder of the people's sovereignty, the Parliament is undoubtedly a central and the most important body of the state power. In exercising this function, it also appears as an interpreter of the constitutional norm, given that, in the framework of implementation of certain policies during the process of drafting and adopting of laws, it should take into account that they must not come contrary to the provisions of Constitution.¹

The Court – exercising its controlling role while maintaining the function as a negative legislator

Constitutional Court has constantly emphasized in its case law its position as a negative legislator.

In the case with the subject matter – interpretation of expression “acts and behavior that seriously discredit the position and figure” – mentioned in some articles of the Constitution, the Court stated that in order to interpret these norms, it could not undertake the role of positive legislator by providing one by one all the cases that could fall under these constitutional causes, as this would be impossible, while the Constitution, laws, or even court decisions cannot precisely codify such acts and behaviors. Under the circumstances when the Constitution or other laws have not provided in details the essential elements of a certain procedure, these elements cannot be completed through its interpretive decision, since interpretation, as a function and method, takes place in cases when existing norms have ambiguities in their meanings and not to fill in the legal gaps, because otherwise the Constitutional Court would be placed in the wrong position as the creator of legal norm, a function which belongs to the legislative body.²

¹ Decision no. 29, dated 31.05.2010 of the Constitutional Court.

² Decision no. 75, dated 19.04.2002 of the Constitutional Court.

In 2010, the President of the Republic, in fulfillment of the competence to appoint the judges, sent to the Parliament the decrees for filling some vacant seats. Pretending to have some uncertainties on issues such as the criteria to be met by the candidates, the Parliament addressed to the constitutional jurisdiction requesting the interpretation of some constitutional norms. In this case, the court reiterated its role as a negative legislator, considering that, while exercising their constitutional powers, the President and the Parliament are the first interpreters of the constitutional norm, what means that it belongs to them and not to the Constitutional Court to define the criteria that should be met by candidates, since *a contrario*, this Court would interfere with the exercise of constitutional powers of each of these bodies, violating the principle of separation and balancing of powers.³

Evolution and re-dimensioning of the role of Constitutional Court through conciliatory interpretation

Nevertheless, Constitutional Courts have over time moved away from the Kelsenian model by developing constitutional legal tools and instruments that go beyond the model of negative legislator and allow the Court, to a considerable extent, to establish rules that immediately fill in the legal gaps created following its decisions on repealing of legal provisions.

The idea to preserve the law has created to the Constitutional Court the possibility to avoid its repealing, in order not to create legal gaps, by making use of interpretations that would give to the law a meaning compatible with the Constitution. Therefore, the constitutional courts consider whether a law could be interpreted in compliance with the Constitution, making every effort to preserve its validity and employing this way of interpretation, so that any other position that may lead to the declaration of law as unconstitutional could be overturned.

Influenced by the jurisprudential developments of the constitutional courts of other European countries, during the last years, Constitutional Court of Albania has extensively applied the method of conciliatory interpretation of the challenged laws, considering that this type of interpretation is possible when a law or legal provision might be interpreted in more than one way, one of which is in compliance with the Constitution.⁴

³ Decision no. 24, dated 09.06.2011 of the Constitutional Court.

⁴ *Ibid*

The Court considered *“The method of conciliatory interpretation seeks for the constitutional effects of different outcomes and selects the outcome that is in compliance with constitutional values. Based on this method of interpretation, the Court has reached the conclusion that the contested law is constitutional, provided that its norms be interpreted in the same way as the Court has done in its decision.”*⁵

According to the Court's opinion, *“an incorrect regulation of the legal norm, which leaves room for different interpretations and brings about consequences, does not come in line with the purpose, stability, reliability and effectiveness intended by the norm itself”*.⁶

The Court finding out the omission not filling it

Constitutional Court has an important role both in terms of legislative/normative omission, which is caused by the initial lack of legislative provisions, and the legal omission as well, which is caused due to the repeal of a certain law by the Court or the lawmaker itself.

Even in cases when the Constitutional Court has decided to repeal the legal provision/part thereof, it has sometimes concluded that this repeal does not create a legal gap, so that there is no need for the legislative body to make any additions/fulfillment.⁷ Likewise, another instrument employed by the Court is the postponement of effects of its decisions, even though this allows the continuance of legal effects of the existing law, in order to give time to the lawmaker to react and avoid the violation of constitutional rights due to the legal gap.⁸

Referring to the legal gap created by the lack of action of the lawmaker, the organic law of the Constitutional Court,⁹ in compliance with Article 132 of the Constitution, has provided for that where during the review of a case, the Court finds out that there is a legal gap which has brought negative consequences to the fundamental human rights and freedoms, it, *inter alia*, shall determine the obligation of the legislator to complete the legal framework within a certain period of time. In this case, the competence of the Court is not the positive formulation of the omitting

⁵ Decisions no. 29, dated 31.05.2010; no. 30, dated 17.06.2010; no. 33, dated 24.06.2010; no. 5 dated 16.02.2012; no.2, dated 18.01.2017; no. 34 dated 10.04.2017.

⁶ Decision no. 43, dated 26.06.2015.

⁷ Decision no. 15, dated 17.04.2003 of the Constitutional Court.

⁸ Decisions no. 1, dated 12.01.2011; no. 3, dated 05.02.1010; no. 12, dated 14.04.2010 of the Constitutional Court.

⁹ Article 76, point 5, of the law no. 8577, dated 10.02.2000 “On the organization and functioning of the Constitutional Court of the Republic of Albania”.

norm, but to find out that omission exists and has constitutional consequences, i.e. that inaction of the lawmaker, which has caused the omission, is unconstitutional.

In another case, the Court was set into motion by an organization alleging the violation of constitutional right of immigrants to vote in the general elections of 2021. The Court found that due to non-adoption of by-laws by the CEC, the active right to vote for Albanians residing outside the territory of Albania was restricted on the day of elections. Consequently, the constitutional right to vote for this category of individuals remained a mere declarative provision due to the legal gap, eventually non-applicable in practice and illusory in its essence.¹⁰

Another example, in the case of law on the process of treatment of property, a story that has accompanied Albania since the regime transition, and where a series of legal acts have been produced, which have been subject to continuous amendments over the time also as a result of interventions by the Constitutional Court and the European Court of Human Rights, the Court found out that the right to private property had been restricted also due to the lack of legal regulation on changes that property cadastral data have undergone over the years. This legal gap has resulted in negative consequences to the property right, denying the fair compensation to this category of subjects.

Consequently, in both of these cases, the Court gave the necessary time to the lawmaker to adopt new legal rules in conformity with its decisions.

In conclusions, it should be stated that when exercising the constitutional review, Constitutional Court is not necessarily limited to the existing legal norms, but it may also have a legal influence on the creation and content of future legal norms. However, the exercise of this activity requires action and solution by the competent body through adoption of strategies, if it would be necessary, to address the issues made evident by the Constitutional Court. Although these techniques of intervention do not intend to interfere with the prerogatives of the lawmaker, the instruments available to the constitutional courts and their choice to characterize the Constitution as a document of principles and values that opens up wide-ranging opportunities for the protection of fundamental human rights and freedoms, appear to have overcome the concept of constitutional court as a negative legislator.

Thank you very much for your attention!

¹⁰ Decision no. 38, dated 09.12.2022 of the Constitutional Court.