INTERPRETATIVE DECISIONS OF THE CONSTITUTIONAL COURT OF NORTH MACEDONIA IN THE FUNCTION OF PROTECTING HUMAN RIGHTS AND FREEDOMS

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Abstract

The paper examines the "tense" relationship between the Constitutional Court and the Assembly through the prism of two significant innovations in constitutional judiciary in the Republic of North Macedonia. The first concerns the introduction of what, in European constitutional judiciary, is called an "interpretative decision". Pursuant to Article 36 of the Act of the Court, the Court can conduct an initial review of constitutionality, can express doubts and instituted proceedings, and in the resolution can set out its legal positions, but defers the final decisions and prescribes a time-limit for the adopter to bring the regulation into conformity, under the repressive "threat" of a repealing or annulling decision. The purpose of this innovation is for the Court to preserve the integrity of the legal order while granting the body that adopted the contested regulation one further (time-limited) opportunity to correct itself and return to the sphere of constitutionality, thereby preventing legal vacuums that could have serious implications for the order.
The paper will analyze the objectives, the legal nature and the effect of this type of "repressive interpretative decisions", the grounds for their introduction, and their impact on the "tense" and complex interaction between the Constitutional Court (as a negative) and the Assembly (as a positive legislator).
The second innovation consists of the introduction of the possibility for the Court to monitor the implementation of constitutionality, legality, and the rights and freedoms of individuals and citizens as guaranteed by the Constitution, and, at its own discretion, to adopt a special report indicating the need for measures to be undertaken for their realization and protection, which shall be submitted to the competent authority.

Keywords: *Constitution, Constitutional Court, positive - negative legislator, constitutionality and legality, repressive interpretative*

decisions, implementation of constitutionality, special report, judicial activism.

1. Introduction

The complex relations between the negative (the Constitutional Court) (Brewer-Carias, 2017), and the positive legislator (the Assembly) will, in this paper, be analyzed through the prism of two innovations in Macedonian constitutional adjudication: the introduction of so-called "repressive interpretative decisions", and the adoption of special reports on constitutionality, which are, as expected, and will continue to be, a source of their "tense" interaction.

The Constitutional Court, in addition to its task of being the guardian and protector of the Constitution, in order to be able to fulfil that task, also has the clear duty to interpret the Constitution in its entirety, dynamically and evolutionarily. In this context, the Constitutional Court is faced with a complex set of multidimensional challenges.

The first of these challenges is the necessity for the Court to interpret the fundamental values in a manner that provides them with meaning and content in their manifestations in reality, both in general and in specific cases. In order to arrive at such answers, the Court, in interpreting the Constitution, must actively apply, in addition to all known theories and methods, the evolutionary principle, the theory of living constitutionalism.

The next challenge relates to the guarantees and protection of rights and freedoms of the individual and citizen. The ideal character of human rights and freedoms does not disappear once they are transformed into positive rights. Human rights, on the contrary, remain inseparably linked to constitutional rights, to universal documents, as well as to the changes brought about by the spirit of the times. Hence, the ideal dimension of human rights continues to exist even after their politicization. The very search for the ideal dimension, through requirements for optimization "to the greatest possible extent", or through alternatives such as a "guarantee of a minimum position" or a "prohibition of excessive disproportionality", requires constitutional judges to comprehend seriously both the ideal and the real dimension of law (Kostadinovski, 2024). The pursuit of such answers in specific cases is impossible without constitutional judicial interpretation, which is why interpretation constitutes the most significant segment, and at the same time the greatest challenge, in the work of constitutional judges. The Constitution does not say "read me broadly" - expansively, nor "read me narrowly" - restrictively. The decision to do either must be made as a matter of self-awareness on the part of the constitutional judge (Posner, 1995, pp. 59-79). If we add to this truth the well-known words of Chief Justice Hughes that "the Constitution is what the judge says it is" (Hughes, Charles Evans Hughes), it becomes clear how great a burden and responsibility constitutional judges must bear. The definition

of a "living Constitution" or a "real Constitution" (Kostadinovski, 2024, pp.43-44), is that of a Constitution which changes as times change. The proponents of this theory argue that global and societal changes demand adaptation, an adjustment of the written constitutional values, principles and norms to the transformations that have occurred in society and the world, without any formal amendment of the constitutional text (Fallon, 2001, p. 112). The discrepancy between the written Constitutions and what both theory and practice call the "living or real Constitution" inevitably requires creativity, innovation and vision in the interpretative mission of judges.

The introduction of the two substantive innovations in Macedonian constitutional judiciary is precisely the result of the creativity, innovation and vision within the interpretative mission of the Constitutional Court, which strives to discover and construe the "will of the constitution-makers"; to identify and harmonize the "letter and the spirit of the Constitution" and to "adapt constitutional fundamental values and norms to the changed realities and needs"; prepared and adopted the new Act of the Court, which regulates these innovations. They are result of judicial activism, an implicit competence derived from the interpretation of the fundamental values through the prism of living constitutionalism, since these innovations were necessary, socially justified, and indispensable for the rule of law. This paper, by analyzing the objectives, the legal nature and the effect of the "repressive interpretative decisions" and the "special reports on constitutionality", will develop a justification of the grounds for their introduction and application.

Before proceeding, however, it is important to emphasize that interpretative decisions (Pajich, 2014) are gaining ever-greater importance, and are a useful and frequently employed constitutional judicial mechanism, particularly in countries such as Italy, Germany, Spain, as well as others (Marinco, 2004). The reasons for their popularity lie in the fact that, through their legal effect, they achieve a balance between the imperativeness of the Constitution, the democratic legitimacy of the legislative branch, and legal stability. They prevent unnecessary and harmful legislative vacuums, provide flexibility in constitutional judiciary, promote constitutional dialogue, give clear guidance to the legislator as to how legislation should be harmonized with constitutional norms (Tushnet, 1999, p.45), and foster a constitutional culture of cooperation.

What is common to all forms of interpretative decisions is that they are based on, and support, the concept of a "living Constitution", thereby significantly influencing the development of human rights and fundamental freedoms, as well as the harmonization of national constitutional systems with international standards (Jackson, 2010). In Macedonian constitutional tradition dedication to a concept of a living constitutionalism depends of a believe of any judge individually, and depend particularly, of its interpretation in a specific case.

2. The Objectives, Legal Nature and Effect of "Repressive Interpretative Decisions" and "Special Reports on Constitutionality"

The innovation in Macedonian constitutional judiciary can be seen through Paragraph 2 of Article 36[1], which enables the Court, by formalizing the transition from an initial review of constitutionality and/or legality (reasonable doubt - as the first phase), to proceed to an intermediate phase of a temporary nature (deferred repeal or annulment, or a decision on "provisional constitutionality"), which means granting the competent authority a specific time-limit - up to six months - to amend the contested legal act in accordance with the Court's initial constitutional findings, that is, the Court's legal positions. Depending on the outcome of this intermediate phase, the second phase follows: full and final constitutional review and decision (repealing, annulling, or a decision to suspend the proceedings).

This represents a substantive, significant and necessary innovation, which contains elements of what, in European continental constitutional judiciary, is termed an "interpretative decision", albeit with its own specific features.

3. The Purpose and Legal Nature of Interpretative Decisions

Despite the fact that Article 36 contains no explicit regulation regarding the key questions - why, when, in which cases, under what circumstances, and according to which criteria the Court, at its discretion, may determine a period not exceeding six months for the adopters of the acts to amend an act in accordance with the views of the Court expressed in the resolution, the advantages of introducing interpretative decisions are incomparably greater than the criticisms concerning its insufficient regulation. The primary reason and incentive for the Court to introduce this constitutional instrument is to avoid the creation of a legal vacuum by deferring the repeal or annulment, a normative gap that could affect the realization of the rights and freedoms of individuals and citizens, that is, to avoid a situation in which a higher societal interest would

[1] In the Act of the Court, under the heading "Initiation of Proceedings", Article 36 provides:
(1) Proceedings for the review of the conformity of laws with the Constitution, of the conformity of other regulations and collective agreements with the Constitution and the laws, and of the conformity of the programmes and statutes of political parties and associations of citizens with the Constitution, shall be initiated by a resolution of the Constitutional Court.
(2) In the cases referred to in Paragraph 1 of this Article, the Court, at its discretion, may determine for the adopters of the acts a period not exceeding six months to amend the act in accordance with the views of the Court expressed in the resolution.
(3) If the adopters fail to act within the time-limit determined by the Court, the proceedings shall continue.

be endangered, for example, national security, political or ethnic and religious tensions, or the prevention of serious forms of crime.

The Court's experience has shown that, in many instances, while safeguarding and preserving the Constitution, its decisions have conditionally created a situation of "impossibility" for certain constitutionally guaranteed rights to be effectuated.[2] Within this interaction between the decision of the negative legislator and the expectations and duties of the positive legislator, there emerges a temporal gap, and at times tensions that may lead to antagonism. In order to bridge such a vacuum and potential tension, the Court, at its discretion, may adopt a special type of decision, whereby, notwithstanding its initial finding of unconstitutionality, it does not immediately continue the proceedings nor conclude them with a repealing or annulling decision, instead, it interprets the contested provisions in such a way as to indicate its doubts concerning the constitutionality of the legal act, while, in its reasoning, it provides legal arguments and precise interpretative guidance as to how these provisions might be compatible and aligned with the Constitution. To prevent harmful consequences for individuals and citizens, or for some other overriding public interest, it grants the adopters of those norms a period not exceeding six months to amend the contested legal act in accordance with the Court's legal stance. In this way, the Court creates a situation of "provisional constitutionality", it leaves the contested provisions in force, strikes a form of compromise with the positive legislator, demonstrates a willingness to cooperate, and encourages an institutional dialogue of a preventive nature by allowing legislative self-correction prior to the adoption of a final decision. However, this "offered hand" from the negative legislator is not unconditional. The legislator must comply with three conditions, and faces consequences should it fail to do so:

- First, to respect the time-limit determined by the Court.
- Second, to ensure that the amendments are in accordance with the legal reasoning set out in the Court's resolution.
- Third, all this takes place under the "threat" that, if the first two conditions are not respected, the repressive nature of the negative legislator will prevail, resulting in a repealing or annulling decision, and
- Fourth, responsibility for any harmful consequences arising from such a repealing or annulling decision, transfers to the legislator.

It is precisely these conditions attached to such interpretative decisions, as a special type within constitutional judiciary, that provide them with a

[2] Such an example can be found in the case of the Law on Banks, where the Constitutional Court, by decision, repealed Article 163, paragraph 3, and after 5 years, the legal gap has not been filled. Such a legal situation can and will produce legal uncertainty in the event of a bank bankruptcy, in a way that the rights of citizens as creditors are not ensured because the law does not regulate who has priority in request from the bankruptcy estate. See more https://ustavensud.mk/archives/21026.

distinctive specificity. The threat, or rather the repressive element inherent in them, together with the accountability in cases of non-compliance, is the reason why I personally refer to them as "repressive interpretative decisions".

In addition to the already mentioned advantages, this type of decision will likely lead towards the promotion of constitutional culture and constitutional cooperation.

The benefit of this type of decision of the Court has already been confirmed in two specific cases, one of which has been successfully concluded, while the other is still ongoing. After the entry into force of the new Act of the Court, on 1 September 2024, on 25 September the Court adopted its first interpretative decision. By Decision U.no.137/2017, the Court initiated proceedings for the review of the constitutionality of Articles 176, 177 and 178 of the Law on Electronic Communications and determined a period of six months for the Assembly to amend the Law in accordance with the Court's views set out in the reasoning of this resolution.

In its reasoning, the Court stated the following: "… the Court expressed doubt that the retention of electronic communications data of citizens constitutes a serious intrusion into the constitutionally guaranteed rights to respect for private life, the inviolability of communications, and the right to the protection of the security and confidentiality of personal data, thereby affecting a large number of citizens, indeed, practically the entire population using telephone devices or the internet." In its reasoning, the Court also set out the reason why it opted for an interpretative decision: "...The Court is aware that the retention of data relating to telephone and internet communications constitutes a necessary tool for the prosecuting authorities in detecting and prosecuting criminal offenders, and in safeguarding the security of the State and of its citizens. Precisely for these reasons, so that, on the one hand, the prosecuting authorities are not deprived of this tool in the fight against crime, and, on the other, so that citizens are protected against excessive, disproportionate, and indiscriminate intrusions into their constitutionally protected rights to privacy and freedom of communications, the Constitutional Court decided to apply Article 36 Paragraph 2 of the Act..."

As can be seen, this decision contains all the essential elements that an interpretative decision ought to contain - a review, interpretation and clear guidance, reasons for the "provisional constitutionality", and a time-limit. What is significant is that intensive communication and dialogue followed between the negative and the positive legislator, leading to the successful conclusion of the case by termination of the proceedings by the Constitutional Court in July 2025, on the grounds that the legislator had adopted a new law which, in the Court's view, was fully aligned with the legal positions set out in the interpretative decision (Constitutional Court of the Republic of North Macedonia, 2017, https://ustavensud.mk/archives/30896).

Following this decision, on 12 February 2025, in cases U.no.162/2023 and U.no.163/2023, owing to their societal importance and the exceptionally high public interest, the Court for the second time adopted an interpretative decision, this time concerning the amendments and supplements to the Criminal

Code (Constitutional Court of the Republic of North Macedonia, 2023, https://ustavensud.mk/archives/32824).

Notwithstanding its advantages, Article 36 nevertheless reveals certain regulatory gaps which may jeopardize legal certainty and procedural fairness.[3]

First, I have already emphasized the intention and motives of the judges who voted for and introduced interpretative decisions. The fact that they are not explicitly stated is due to the impossibility of foreseeing in advance all possible legal situations, which is why, in this case, the Court relies on the possibility provided by the Act of the Court, in Article 74, entitled "Circumstances for Decision-Making". Hence, the abstractness of Article 36 and the so-called discretionary power of the Court in applying an interpretative decision are not without criteria. Even when deciding whether an interpretative decision will be applied, the Court must take into account the criteria set out in Article 74:

- all circumstances of relevance for the protection of constitutionality and legality,
- in particular, the seriousness of the violation and its nature and significance for the realization of citizens' freedoms and rights, or for the relations established on the basis of such acts,
- legal certainty,
- and other circumstances relevant to decision-making.

The concern arising from the fact that the contested provision remains in force and produces potentially irreversible legal consequences during the interim period is taken into account by the judges and the Court, and may be objectivised through the application of Article 74 of the Act, as in the case of the importance of preserving metadata for national security.

Second, in relation to the criticisms regarding the absence of precise regulation as to whether the parties concerned are notified or consulted in connection with the decision to postpone, as one of the elements of transparency of the process, the interaction between the negative legislator, the Court, as bearer of the so-called fourth power, the constitutional judiciary, and the positive legislator, the Assembly, as holder of legislative power, is not an interaction in the sense of the principle of separation of powers. Rather, in this interaction, entirely different constitutional rules are relevant, which should not be perceived as rules of power and supremacy, dominance or superiority, but as mutual engagement aimed at ensuring constitutionality, harmony and coherence in the legal order. In this sense, mutually respectful interaction between the negative and the positive legislator is an integral part of institutional and constitutional culture.

Third, in respect of the criticism that Article 36 does not consider the relationship between this postponement mechanism and the application of interim measures provided for in Article 37, it is important to stress that these

[3] Some of these remarks come from the expert team that, within the framework of the EU project 'Strengthening the Capacities of the Constitutional Court,' prepared a report containing an analysis of the Act of the Court.

two constitutional-legal institutes, interpretative decisions and interim measures, are incompatible and mutually exclusive. The essence of interpretative decisions lies in postponing the merits decision and granting the adopter of the contested act the opportunity for self-correction, while leaving in the legal order the norms over which doubts have been expressed.

As regards the effect and legal nature of interpretative decisions, pursuant to Article 71 of the Act, the Constitutional Court adopts two types of acts, decisions and resolutions. Article 72 regulates the cases in which the Court delivers a decision, namely, the importance of the substance of the matter. Pursuant to Article 73, the Court issues resolutions in cases when it does not decide on the substance of the matter. The legal nature of interpretative decisions, in addition to Article 36, is also determined by Article 71 (the resolution on an interpretative decision is a Decision of the Court), Article 73 Indents 1 or 5 (by the Resolution on an interpretative decision the Court does not decide on the substance of the matter), Article 74 (which establishes the criteria and circumstances for decision-making, as already discussed), Article 79 (according to which the Court may decide that separate resolutions be published in the "Official Gazette", which is to be understood when it comes to interpretative decisions). In that regard novelties in the new Act of the Court can be seen in Article 81 (according to which the decisions of the Court are final, enforceable and legally binding upon all legal entities). In Article 85 (according to which the obligation to enforce the decisions of the Court commences on the day of their publication in the "Official Gazette", and the decisions of the Court are to be enforced without any delay), Article 86 (according to which the Court, ex officio, monitors the enforcement of its decisions and may request from anyone data and information regarding the measures taken to ensure the execution of its decision), and Article 90 (according to which the Court, if necessary, shall request public authorities to secure the enforcement of the decision). This novelties are not yet implemented in a concrete case, although a couple of cases are been followed by the Court – ex officio!

4. Basis for the Introduction of "Repressive Interpretative Decisions" and "Special Reports on Constitutionality"

The competence of the Constitutional Court to decide on the conformity of laws with the Constitution, on the conformity of other regulations and of collective agreements with the Constitution and with the laws, as well as its competence to repeal or annul a law if it determines that it is not in conformity with the Constitution, are explicitly regulated in the Constitution, in Articles 110 and 112. In contrast, the competence of the Court to adopt interpretative decisions is regulated in Article 36 of the Act of the Court. As I have already emphasized, this competence is the result of judicial activism and represents an implicit competence of the Constitutional Court (self-assigned by the Court). Such judicial activism derives from and is a result of living constitutionalism and the necessity of adapting the constitutional text to

changing realities, without its formal amendment. In this sense, the introduction of interpretative decisions through their regulation in the Act of the Court also has its justification and foundation in the fact that constitutional judiciary in Macedonia represents a *sui generis* case. To clarify, the constitutional framework regulating the status, composition and competences of the Court comprises only six articles of the Constitution, Articles 108 - 113. The question arises: what was the intention of the Constitution in providing such a "modest" legal framework, in which the first thing that "strikes the eye" is the absence of a constitutional basis for a special law on the Constitutional Court, by which the constitutional provisions would have been further regulated and specified? The dilemma prevailing among both practitioners and scholars is whether, having already conferred upon the Court the status of a fourth power, thus placing it above all state authorities [4] and not subject to the principle of separation of powers, binding it solely to the Constitution, was in essence to exclude the Court from political influence, that is, from additional regulation by the legislator? Was the intention that, through an Act of the Court (if it is treated as a sub-constitutional act), as provided in Article 113 of the Constitution, the Constitutional Court should in fact be self-regulatory, itself specifying and further regulating the constitutional provisions? Was this a matter of omission or intention? Might time itself provide an answer to these questions? There are arguments which may support and defend all of these assumed intentions.

Let us proceed from the assumption that the intention[5] was for the Constitutional Court to be self-regulatory and to operationalize the constitutional provisions through its Act of the Court. In the past 34 years, the constituent body has undertaken numerous amendments to the Constitution itself, yet at no point has it decided to further regulate the constitutional

[4] Recommendations for the adoption of a Law on the Constitutional Court have been provided by the Venice Commission, the European Union through the Report of the TAIEX Expert Mission (an instrument of the European Commission) concerning the protection of human rights by the Constitutional Court, as well as by the German Foundation for International Legal Cooperation (IRZ)., however, all these recommendations point to the need to establish a constitutional basis in Article 113 of the Constitution.

[5] In its Opinion on the seven proposed amendments to the Constitution of the Republic of Macedonia (CDL-AD(2014)026), the Venice Commission emphasizes: "In most European countries, constitutional provisions concerning constitutional courts are further developed through specific laws or constitutional laws. In contrast, there is no specific law on the Constitutional Court in the Republic. The only legal act currently regulating the activities and competences of the Court is the Rules of Procedure from 1992 (now referred to as the Act of the Court). The Venice Commission finds this situation entirely inadequate. In the Commission's view, it would be beneficial to adopt a specific law on the Constitutional Court that would regulate matters such as the status of judges, the basic conditions for initiating proceedings before the Court, the effect of the decisions of the Court, etc. It is necessary to add a new paragraph to Article 113 of the Constitution referring to such a specific law on the Constitutional Court."

provisions by providing a constitutional basis for a special law on the Constitutional Court to be adopted by a two-thirds majority, or by constitutional law, nor has it attempted to adopt a Law on the Constitutional Court without a qualified majority. From this, it follows that the constituent body, the Assembly, has recognized the intention that the Constitutional Court should be self-regulatory, itself specifying and further regulating the constitutional provisions through its Act of the Court[6], as its uncontested competence not only judicial but also normative.

Within such a constitutional reality, the extension of its competence, through the introduction of competences for interpretative decisions and special reports for the protection of constitutionality, has its legal basis. The basis lies not only in regulation in the Act of the Court, no one should be surprised by the expansion of the competencies of the Court once again in an implicit manner, through the interpretation of the fundamental values of the Constitution. One such novelty, without being normatively regulated, but as a result of judicial activism and as a break with the old and the establishment of a new judicial practice, is the competence of the Court to decide in cases of conflict of laws. The Court has already adopted decisions in which it has abandoned its long-standing practice of declaring itself incompetent in cases of conflict between laws (Constitutional Court of the Republic of North Macedonia, 2022, https://ustavensud.mk/archives/23879). This new practice is not general, applicable to every conflict of laws, but depends on a case-by-case basis, only when, assessing the circumstances, the Court establishes that the conflict of laws seriously undermines legal certainty and when it leads to arbitrariness that may have serious consequences for the exercise of citizens' rights.

In this way, judicial activism and the change in judicial practice determine the real appearance of the Constitution and of the order established by it, perhaps even more effectively than the explicit norms contained in the Constitution.

[6] I personally believe that the presumed intention of the constitutional legislator was to allow time to provide appropriate answers as to whether a legal refinement of the constitutional provisions concerning the Court is necessary, and in my view, this is more than necessary, as the current *sui generis* position is unsustainable and continues to produce challenges of various kinds. More on my views on this matter, see my address at the roundtable organized within the framework of the EU project "Is a Law on the Constitutional Court Necessary?", available at www.ustavensud.mk. In truth, this constitutional precedent could become an "open door" to another negative extreme, the establishment of a "constitutional courtocracy", in which the Constitutional Court assumes the role of constitutional legislator, as well as both negative and positive legislator.

5. The Impact of Constitutional Novelties and the Imbalance between the "Positive and Negative Legislator"

The introduction of interpretative decisions and of special reports on constitutionality, as a result of judicial activism and of a creative, innovative and visionary interpretation of constitutional values and norms in accordance with the spirit of the times, thereby expanding the competences of the Constitutional Court, represents a form of "soft" revision of the text of the Constitution (Kostadinovski, 2022; Kostadinovski, 2023).

In reality, both the explicit and the implicit competence of the Constitutional Court lead to a greater or lesser step beyond the role of the Constitutional Court as a negative legislator and to an "intrusion" into the sphere of activity of the positive legislator. Reactions to such "intrusions" on the part of the positive legislator vary from case to case. The discussion concerning the relationship between the positive and negative legislators is very interesting, but by no means simple or easy. There are several important arguments in support of this statement.

First, within the relations between the positive and negative legislator there are often present not only constitutional-legal but also political-legal elements. Parliament is a representative body of the citizens who, by electing their representatives, exercise power, since sovereignty derives from and belongs to the citizens. On the other hand, in modern constitutional states, the so-called fourth power, the constitutional judiciary, acts as the sole controller and corrector of democratically established powers. In such a legal state, everyone is subordinate to and obliged to respect and implement the Constitution. Yet from this constitutional position and from the competences vested in the Constitutional Courts (whether explicit or implicit), implications and consequences of the decisions of the negative legislator upon the positive legislator are inevitable.

Jasna Omejec rightfully concluded that: "the defensive role of the Constitutional Court in protecting the Constitution is no longer its sole role today, and in many countries with stable democracies it is no longer its most important role.... In many cases, Constitutional Courts established the constitutional legitimacy of the laws they examined, and their decisions in these cases had significant consequences. This was the result of the fact that in the second half of the 20th century Constitutional Courts not only defended, but also began to interpret the Constitution. The interpretative role of the Constitutional Courts, as opposed to their original defensive function, had a positive impact on the promotion of general standards and guidelines for the conduct of public authorities. In this way, by interpreting the Constitution, Constitutional Courts began to provide state bodies with conceptual tools and standards for action.[7] Therefore, today, Constitutional Courts no longer have

[7] This is, in fact, the essence of interpretative decisions. In striving to create a comprehensive legal order, the Court, in its exercise of abstract constitutional review, has also begun to apply so-called meta-legal criteria - standards developed by the

only the defensive task of safeguarding the Constitution, but also an important role in the creation of a comprehensive legal order." (Omejec, 2009, pp.31-33; Kostadinovski, 2021).

This "new" role of the Constitutional Court "represents a significant limitation" of the power of the legislative body. The very existence, alongside the positive legislator, of a negative legislator means that antagonism between the two is almost inevitable. However, this antagonism can nonetheless be mitigated.

Like other Constitutional Courts in Europe, the Macedonian Constitutional Court, within the framework of modern or so-called "new constitutionalism", departing from formalism and inclining towards judicial activism, has adopted and refined mechanisms such as interpretative decisions and special reports on the protection of constitutionality, which, aiming to avoid and/or mitigate antagonism (Constitutional Court of the Republic of North Macedonia, 2022, У.бр.137/2017 – Уставен суд на Република Северна Македонија) between the positive and the negative legislator, initiate constitutional culture, dialogue, cooperation and respect between institutions.

Within this interaction, at first sight, the decisions of the Court, as a negative legislator, seem to be equated with the laws adopted by the positive legislator. They possess a universal binding force, operate *erga omnes*, and everyone is obliged to respect them. Nevertheless, alongside these similarities, there are also differences that affect the relationship between the negative and the positive legislator. Unlike laws, the decisions of the Court cannot be amended, supplemented or annulled by anyone except by itself. If the Constitutional Court establishes that certain provisions are unconstitutional, it will repeal or annul them, or it will proceed to interpretative decisions. These decisions are final, enforceable and generally binding, binding also upon the positive legislator. With such decisions, the Court, as a negative legislator, directly intervenes in the legislative process and thereby influences the implementation of legislative policy, generating not only constitutional-legal but also political implications. In such cases there is a direct influence of the decision of the negative legislator upon the positive legislator. In these cases, the negative legislator leaves no right of choice to the positive legislator!

Unlike direct influence, the indirect influence of the negative legislator on the positive legislator occurs in the following cases.

First, it is a generally known and accepted fact that the legal characteristics of finality, enforceability and general binding effect apply equally not only to the operative part but also to the legal positions of the Court

ECHR (these include examining the legitimate aim of the legislator, the social justification, and the necessity of certain legislative solutions in a democratic society - a significant novelty). Such a example can be seen in Resolution https://ustavensud.mk/archives/32824 where the Court examine the legitimate goal for the changes in the Criminal Code, examine whether the changes are socially justified and necessary, and examine the proportionality between the old and the new legal norms.

expressed in the reasoning of its decisions (Scholler, 2000, p.246). These reasonings embody the interpretative process that has led to the decision. In them, the Constitutional Court specifies, gives meaning, content, scope and limits not only to the fundamental values, which are the most abstract in the constitutional text, but also to the principles and postulates derived from them, to the provisions of the Constitution. Such interpretations serve as an exceptionally important guide and framework for the actions of the positive legislator. It is precisely through these positions expressed in the reasoning of its decisions that the Constitutional Court indirectly influences the positive legislator.

Second, there is indirect influence on the positive legislator in cases where the Court, monitoring the implementation of constitutionality, legality and the freedoms and rights of individual and citizen guaranteed by the Constitution, at its own discretion adopts a special report pointing out to the positive legislator the need to undertake measures for their implementation and protection. The introduction of the institute of monitoring the implementation of constitutionality is likewise an important novelty in constitutional judiciary. I have already emphasized that this institute has been applied, and two new special reports are currently under preparation.[8] The first such Report, adopted by the Constitutional Court, concerned the interpretation of Article 52 paragraph 2 of the Constitution, which refers to the institute of *vacatio legis*. The conclusion of that special report stated: "... The Constitutional Court, in accordance with Article 13 of the Act and established case-law, concludes that there is a need to adopt a report in order to draw the attention of the competent state bodies to the fact that the formal aspect of regulations is of equal importance as their substantive aspect, and in their actions they must respect the obligation deriving from the Constitution relating to the time limit for publication of laws and other regulations in the 'Official Gazette of the Republic of North Macedonia'."

These reports serve as a guide for the positive legislator on how it should and how it is "desirable" to act, thereby once again creating purview for the Constitutional Court to intervene, indirectly, through a form of institutional dialogue and cooperation (not repressively), in the sphere of activity of the positive legislator. In this way, the Constitutional Court contributes to the observance and strengthening of constitutionality and legality without acting as a negative legislator.

A mixed model of so-called "repressive indirect influence" of the negative on the positive legislator occurs in the case of interpretative decisions. The specific feature of this model is its temporal and transitional character.

[8] The two special reports currently in preparation relate to identified technic and nomotechnic errors and omissions, which have been challenged in numerous cases before the Constitutional Court on the grounds that they violate legal certainty and, by extension, the rule of law, as well as to address observed instances of unconstitutionality and illegality in the actions of local self-government bodies, particularly concerning the types of acts they are authorized to adopt.

Namely, the indirect influence may be within a period of up to six months, after which the indirect influence turns into direct influence, because if the positive legislator fails to observe the time-limit and/or the legal positions of the negative legislator, the latter will resort to the repressive method and adopt either a repealing or an annulling decision. Such decisions of the Constitutional Court are characterized by its simultaneous action and decision-making as a negative and, indirectly, as a positive legislator. What is important to emphasize is that even in such cases, these decisions cannot and must not be treated as the Court assuming the legislative functions (Arlović, 2015, p.23).

From the foregoing it follows that in all these models, the Court makes smaller or greater "intrusions" into the sphere of the positive legislator, which provoke dissatisfaction, and sometimes even hostility, especially when decisions are burdened with political premises. For this author, the "most elegant" way of reducing antagonism and overcoming potential tension is represented by the interpretative decisions of the Court. By the very fact that a law initially found unconstitutional by the Constitutional Court remains in force for a certain time and is recognized with "provisional constitutionality", the legislator is enabled to bridge the situation calmly and, with as little damage as possible, to remove/correct a regulation or certain provisions from the constitutional legal order. I consider that the legislator should regard the Constitutional Court as a "close friend and collaborator". The legislator knows that "entrusting part of its legislative power" to the constitutional judges is the safest way to ensure the adoption of a constitutionally based law. And in practice, this is the most common reaction of the positive legislator. There are cases, less frequent, where the legislator attempts creatively to re-formulate the law in such a way as to "circumvent" the decision of the Court, including its legal positions (Dissenting opinion, Decision, 2022, Издвоено мислење по предметот У.бр.4/2022 – Уставен суд на Република Северна Македонија). In this option the legislator risks renewed intervention and "influence" by the Constitutional Court. Likewise, there are rare cases where the reaction of the positive legislator is complete disregard of the decisions (Constitutional Court of the Republic of North Macedonia, 2020, https://ustavensud.mk/archives/21026), as well as cases of open non-compliance with the decisions of the Court (Constitutional Court of the Republic of North Macedonia, 2023, http://ustavensud.mk/archives/25252).

Conclusion

1. Interpretative decisions represent the so-called decisions with deferred repeal or annulment, or decisions on "provisional constitutionality". The deferral effect is incorporated into the period assessed and determined by the Constitutional Court, which may not exceed six months. The preventive effect is incorporated in the fact that the adopter of the act is left to carry out amendments itself, which must imperatively be aligned with the legal positions of the Court, thereby preventing, within a certain time-limit, the occurrence of harmful consequences of higher public and societal interest. However, in the

legal nature of interpretative decisions there is also a so-called "repressive" element, namely, conditionally speaking, a "threat" that if the decision of the Court is not respected in terms of observing the time-limit for the necessary amendments, then in accordance with the legal positions set out in the reasoning of the Resolution, the Constitutional Court shall continue the proceedings and adopt a decision based on the merits. Responsibility for any potential harmful consequences that might arise from a repealing or annulling decision, in case the order and the time-limit determined by the Court are not respected, passes onto the legislator.

2. Deferred restoration of the state of constitutionality is carried out with the aim of avoiding legal gaps that might affect the rights of legal subjects, or other higher public and societal interests and objectives, such as state security, political or ethnic or religious tensions, or prevention of serious forms of criminal offences.

3. These decisions aim to clarify how certain provisions of the Constitution are to be understood. By their legal nature, constitutional norms are abstract and broad, representing a framework open to multiple and diverse interpretations and as such, they are sometimes insufficiently clear, ambiguous, or contradictory. Interpretative decisions help to ensure that such norms are properly applied, or if misapplied, allow for the possibility of self-correction by their author(s). The aim thereby is to ensure that the Constitution is applied consistently, in accordance with its original intent but also in line with the principles of living constitutionalism.

4. These decisions have the effect of binding legal precedent. In cases where the interpretative decision achieves its purpose, which would mean that the positive legislator, within the prescribed time-limit, has made the amendments in accordance with the legal positions of the Court, the Court will suspend the proceedings. However, the interpretations of the Court, translated into constitutional-legal positions in the Resolution for the interpretative decision, retain their characteristics of being final, enforceable and generally binding for everyone, including the Constitutional Court itself. Until the moment they achieve their purpose, they have a specific *inter partes* effect since this type of decision represents a relationship between the Court and the legislator, leading to an institutional culture of mutual respect and the easing of relations.

5. Influence on the political process. As we have already seen, constitutional courts may use interpretative decisions to influence or guide the political process, but in a different spirit of cooperation, in contrast to the repressive one.

6. Development of constitutional doctrine and constitutional culture. Over time, interpretative decisions may help the positive legislator itself (through one of its bodies - the Constitutional Law Commission) to develop constitutional doctrine, based on the legal interpretations of the Constitutional Court in its decisions, as a framework for a better understanding of the fundamental constitutional values, principles and their application in different legal contexts.

7. Interpretative decisions also possess the power of the so-called "soft revision" of the Constitution. In essence, this concerns the application of the theory of living constitutionalism. In some cases, interpretative decisions may effectively lead to a change in the meaning of constitutional provisions without a formal amendment of the Constitution. Courts may interpret a provision in a way that expands or reduces its definition, scope and reach (Fallon, 2001, p. 112).

8. Mutual interaction with international law. Fundamental values of the constitutional order among others, include: the basic freedoms and rights of the individual and citizen recognized in international law and established by the Constitution, and the respect for generally accepted norms of international law. They also represent a tool for the interpretation of the normative text. In practice, the case-law developed by international courts, such as the ECtHR in Strasbourg, whereby certain standards are introduced through which the definitions, scope and boundaries of the freedoms and rights under the European Convention on Human Rights are altered, becomes an inevitable and necessary criterion also for our Constitutional Court when interpreting domestic constitutional provisions, with the aim of harmonizing national with international standards (ECHR, Decision, 5856/72, 1978).

Bibliography

Arlović, M. (2015, May 18–20). *Decisions of the Constitutional Court of the Republic of Croatia with special reference to the grace period (types, legal nature, and effects)* [Paper presentation]. Roundtable on The legal nature of the decisions of the Constitutional Court and their consequences, Miločer, Montenegro.

Bačić, P. (2010). *Constitutionalism and judicial activism* [Konstitucionalizam i sudski aktivizam]. Pravni fakultet u Splitu.

Brewer-Carías, A. R. (2011). *Constitutional courts as positive legislators: A comparative law study*. Cambridge University Press.

Constitutional Court of the Republic of North Macedonia. (2017). Decision No. 137/2017 (July 17, 2025) [Unpublished decision].

Constitutional Court of the Republic of North Macedonia. (2020). Decision No. 247/2020 (May 25, 2021). https://ustavensud.mk/archives/21026.

Constitutional Court of the Republic of North Macedonia. (2022). Decision No. 113/2022-1 (March 21, 2023).

Constitutional Court of the Republic of North Macedonia. (2022). Separate opinion in case No. 4/2022 [Издвоено мислење по предметот У.бр.4/2022].

Constitutional Court of the Republic of North Macedonia. (2023a). Decision No. 162/2023 and 163/2023 (February 12, 2025).

Constitutional Court of the Republic of North Macedonia. (2023b). Decision No. 81/2023 (December 5, 2023).

European Court of Human Rights. (1978, April 25). *Tyrer v. the United Kingdom* (Application no. 5856/72).

Fallon, R. H., Jr. (2001). *Implementing the Constitution*. Harvard University Press.

Jackson, V. C. (2010). Constitutional dialogue in transnational perspective. *International Journal of Constitutional Law, 8*(2), 220–240. https://doi.org/10.1093/icon/moq013.

Kostadinovski, D. (2021). *Loyalty to the Constitution 1 – The separate opinions of judge Dr. Darko Kostadinovski*. AD Kultura.

Kostadinovski, D. (2023). *Loyalty to the Constitution 2 – Interpretation of the Constitution*. AD Kultura.

Kostadinovski, D. (2024). *Loyalty to the Constitution 3 – The theory of living constitutionalism*. AD Kultura.

Kostadinovski, D. (2025). *Loyalty to the Constitution 4 – Implementation of the decisions of the Constitutional Court*. AD Kultura.

Marinko, T. (2004). Interpretative Constitutional Court's Decisions [Интерпретативне одлуке уставних судова]. In Constitutional Court of Serbia - Towards the new Constitution of Serbia, Collection of works (pp. 243–261). Belgrade.

Omejec, J. (2009). On the necessary reforms in the structure of Croatian constitutional justice [O porebnim promjenama u strukturi hrvatskog ustavnog sudovanja]. In J. Barbić (Ed.), *Croatian constitutional justice* [Hrvatsko ustavno sudovanje] (pp. 31–33). HAZU.

Pajić, N. (2014). Interpretative decisions in the practice of the Constitutional Court of Serbia [Интерпретативне одлуке у пракси Уставног суда Србије]. *Collection of Papers of the Faculty of Law in Novi Sad*, 359–373.

Posner, R. A. (1995). *Overcoming law*. Harvard University Press.

Scholler, H. (2000). The principle of the rule of law in the practice of the Federal Constitutional Court with respect to the binding legal force of judgments. In *Constitutional Court in the protection of human rights*. Zagreb.

Tushnet, M. (1999). *Taking the Constitution away from the courts*. Princeton University Press.