CONSTITUTIONAL INTERPRETATION AND THE ROLE OF THE CONSTITUTIONAL COURT AS A "NEGATIVE LEGISLATOR" IN REPUBLIC OF NORTH MACEDONIA

Muhammed IZETI[1]

[1*]*Department of Constitutional Law, Faculty of Law*
[*]*Corresponding author e-mail: muhammed.izeti@unite.edu.mk*

Abstract

This paper analyzes the role of the Constitutional Court as a "negative legislator", a concept originally formulated by Hans Kelsen, and the way in which this role has been implemented and developed in the practice of the Constitutional Court of the Republic of North Macedonia. Through the analysis of normative acts and concrete decisions of this Court, the paper shows how constitutional review, in particular through decisions on abrogation and annulment, as well as through interpretative decisions, has pushed the Court beyond the classical negative function towards a more active role in shaping the meaning of the constitutional norm. The paper then offers a comparison with the constitutional systems of other countries in the region – Albania, Kosovo, Serbia and Croatia – identifying institutional similarities and differences in constitutional review and in the degree of judicial activism. In conclusion, it is argued that the dividing line between "negative legislator" and "positive legislator" remains increasingly blurred in the contemporary practice of constitutional justice in the Western Balkans.

Keywords: Constitutional justice; Negative legislator; Constitutional interpretation; Constitutional Court of North Macedonia; Judicial activism; Constitutional review.

1. Introduction

Constitutional justice constitutes one of the main pillars of the modern rule of law, ensuring that the legal norms created by the legislative power remain in accordance with the fundamental principles and values set out in the Constitution. At the heart of this function is the Constitutional Court, a body that, according to the classical conception formulated by the Austrian lawyer Hans Kelsen at the beginning of the 20th century, does not create new legal norms, but only removes them from the legal system when they conflict with the Constitution. For this reason, Kelsen described the Constitutional Court as a "negative legislator", in contrast to the parliament, which remains the "positive legislator", the only body democratically legitimated for the creation of new norms (Kelsen, 1928).

However, the practice of constitutional justice in recent decades has shown that the boundary between the "negative" and "positive" function of constitutional courts is not as clear as the original Kelsenian theory predicted. The widespread use of interpretative decisions, "additive" decisions and other techniques of constitutional decision-making has led many scholars, and even the constitutional courts themselves, to acknowledge that these institutions exert, to a considerable extent, a creative influence on the meaning and scope of legal norms (Favoreu, 1994; Sadurski, 2014).

This paper aims to analyze this phenomenon in the specific context of the Constitutional Court of the Republic of North Macedonia, an institution with several distinctive features in the region – in particular its status as a self-regulatory body, without a separate organic law regulating its functioning, which has given this Court a wide self-regulatory space in the development of its interpretative methods and techniques. Through the analysis of several concrete decisions and comparison with the practices of neighboring countries – Albania, Kosovo, Serbia and Croatia – the paper aims to provide a comparative overview of the way in which the constitutional justice of the Western Balkans is constantly redefining its institutional role.

The paper is structured in five main parts: first, the theoretical framework of the concept of "negative lawmaking" is addressed; second, the main forms of constitutional decision-making that touch this theoretical boundary are analyzed; third, the concrete practice of the Constitutional Court of North Macedonia is examined; fourth, a regional comparison is presented; and finally, the relevant conclusions and recommendations are drawn.

2. Theoretical framework: the concept of the "negative legislator" according to hans kelsen

The concept of the "negative legislator" originates from Hans Kelsen's pure theory of law (Reine Rechtslehre) and from the Austrian model of constitutional review, created in 1920, which served as a model for most of the European constitutional courts established later, including those of Central and Eastern Europe after the collapse of socialist regimes (Kelsen, 1942). According to Kelsen, the function of the constitutional judge differs essentially from that of the legislator: while parliament creates new norms by expressing the political will of the democratic majority, the constitutional court acts only "negatively", by abrogating – not creating, but eliminating – norms that contradict the Constitution.

This functional separation was initially conceived as a mechanism for preserving the democratic legitimacy of constitutional courts, which, unlike parliaments, are not directly elected by the people. By limiting itself to the "negative" function, the constitutional court avoids – at least in theory – a conflict with the principle of the separation of powers and the democratic legitimacy of the legislator.

However, the practice of constitutional courts themselves – including the Austrian one, which Kelsen first conceived – has shown that this theoretical limit is much more unstable in practice than in conception. Various forms of decision-making, such as "conditional" interpretative decisions (which accept the constitutionality of a norm only under a certain interpretation), "additive" decisions, which extend the scope of a norm to include situations that the legislator had not expressly foreseen, or "substitutive" decisions, place the constitutional court in a position that comes very close to the positive legislative function (Cappelletti, 1989). For this reason, contemporary constitutional law doctrine increasingly speaks of a "negative legislator with positive traits", or of the phenomenon of "constitutional judicial activism".

3. Forms of constitutional decision-making and the limit between interpretation and rule-making

In the practice of the constitutional courts of the region, including that of North Macedonia, four main types of decisions that have an effect on a legal norm are distinguished:

a) Decisions of rejection – when the Court finds that the contested norm is in accordance with the Constitution and the initiative or request is rejected;

b) Decisions of annulment, with retroactive effect, which treat the norm incompatible with the Constitution as if it had never existed from the moment of its adoption;

c) Decisions of repeal, with future effect, which remove the norm from force only from the moment of publication of the Court's decision, preserving the legal effects created in the past;

d) Interpretative decisions, through which the Court does not repeal the norm, but determines which of its possible meanings is in accordance with the Constitution, mandatorily guiding the future interpretation of this norm by ordinary courts and administrative bodies.

It is precisely the last category – interpretative decisions – that is often considered a "gray area", where the negative function of the constitutional court shifts to a de facto positive function, as the Court, instead of simply eliminating the norm, determines its mandatory content, thus approaching the role of the legislator.

4. The constitutional court of the republic of north macedonia as a “negative legislator”: institutional specificities and practice

4.1 Institutional status

The Constitutional Court of the Republic of North Macedonia represents a special case in the regional and European context, as it is one of the few constitutional courts in Europe that operates without a separate organic law (“Law on the Constitutional Court”), relying directly on constitutional provisions and its own Rules of Procedure, which it adopts and amends itself, in the capacity of a self-regulating body. This feature has given the Court a high degree of institutional, administrative and budgetary autonomy, but at the same time has also raised questions about the limits of its procedural self-regulation, especially when it comes to the creation and implementation of new decision-making techniques, such as interpretative decisions.

4.2 The antagonism between the “positive legislator” and the “negative legislator” in the Court’s own approach

The leadership of the Constitutional Court of North Macedonia itself has openly acknowledged the existence of this functional tension. In international meetings and forums of constitutional courts, the President of the Court has emphasized that the parallel existence of the “positive legislator” (the Parliament) and the “negative legislator” (the Constitutional Court) brings, almost inevitably, a certain antagonism between them, which, however, can be mitigated through certain institutional mechanisms. In this context, the Court has evidenced that, following the trend of “new constitutionalism”, present in many European constitutional courts, it has abandoned the formalist approach and has oriented itself towards forms of judicial activism, developing mechanisms such as interpretative decisions and special reports for the protection of constitutionality – precisely with the aim of mitigating the antagonism between the two “legislators” and promoting a constitutional culture based on institutional dialogue (Уставен суд на РСМ, materials of institutional speeches).

4.3 Examples from concrete practice

The practice of the Constitutional Court of North Macedonia provides numerous examples illustrating the transition from a purely “negative” function to more active forms of constitutional intervention:
In case U.br.314/2020, which concerned provisions of the Rules of Procedure of the Government, the initiator requested that the Court, at its discretion, choose between the retroactive effect and the future effect of its decision. This case illustrates the broad discretion that the Court enjoys in determining the legal consequences of its decisions – an element that brings its role closer to that of a body that “models” normative consequences, rather than simply mechanically eliminating them.
In case U.br.6/2017, which dealt with the constitutionality of a provision of the Law on Amendments and Supplements to the Law on Privatization and Lease of Construction Land, the central issue was the respect for the right to property guaranteed by the Constitution. The court was tasked with assessing whether the limitation of this right by the legislator was justified by the public interest – a proportionality assessment that essentially requires a creative interpretation of constitutional values, and not simply a mechanical norm-by-norm comparison.
In case U.br.55/2018, which dealt with ambiguities in the provisions of the General Law on Administrative Procedure regarding the cancellation of an “administrative contract”, the

initiator himself highlighted the existence of several gaps and normative ambiguities – which body cancels the administrative contract, before which body it can be contested, and by what act the cancellation is carried out. This situation placed the Court before the dilemma of whether it should only assess the formal constitutionality of the norm, or provide interpretative guidance on the manner of its implementation – a typical case where the "negative" function touches the limits of the "positive" function of filling legal gaps.
These examples show that, even without being a competence formally expressed as "positive decision-making", the daily practice of the Constitutional Court of North Macedonia constantly places it face to face with choices with a creative normative effect – whether through determining the temporal effect of decisions, or through assessing proportionality, or through providing interpretative guidance on the implementation of unclear norms.

5. Comparison with countries in the region

5.1. Albania

The Constitutional Court of the Republic of Albania, fundamentally redesigned after the 2016 judicial reform, operates on the basis of a special organic law (Law No. 8577/2000, as amended), which clearly distinguishes it from the self-regulatory model of North Macedonia. The Albanian Constitutional Court enjoys the power of both abstract and concrete control, through the institute of individual constitutional petition, which gives it a more direct contact with concrete violations of fundamental rights and, at the same time, exposes it more to the need for creative interpretation in individual cases.

5.2. Kosovo

The Constitutional Court of the Republic of Kosovo, established on the basis of Articles 112–116 of the 2008 Constitution, is known for a relatively active practice in the field of protection of fundamental rights, especially through the institute of individual constitutional petition. Unlike North Macedonia, Kosovo has a special law on the Constitutional Court and Rules of Procedure adopted on its basis; however, practice shows that this Court has also developed forms of decision-making that go beyond the simple repeal of norms, by providing concrete instructions to public institutions on how to execute its decisions – an element that also brings its function closer to the "positive" one.

5.3. Serbia

The Constitutional Court of Serbia operates within a similar constitutional framework to that of Macedonia, with a common legal tradition inherited from the former Yugoslavia, including the distinction between "poništavanje" (retroactive effect) and "ukidanje" (future effect). The practice of this Court shows a similar tendency to that of Macedonia towards the use of "qualifying" or interpretative decisions, especially in sensitive areas such as property law and administrative procedure.

5.4. Croatia

The Constitutional Court of Croatia (Ustavni sud Republike Hrvatske) is considered one of the most active in the region in terms of developing interpretative techniques, including the frequent use of "decisions with guidelines" addressed to the legislator, in which the Court not only finds constitutional incompatibility, but also sets concrete deadlines and parameters within

which the legislator must act to harmonize legislation with the Constitution. This model represents perhaps the most advanced regional form of the transition from the classic "negative legislator" to a "qualified negative legislator", which interacts directly with the legislative process.

5.5. Comparative overview

The regional comparison shows that, despite the differences in the organic legal framework – North Macedonia as a unique case of self-regulation, versus Albania, Kosovo, Serbia and Croatia, which have special laws – all four systems share a common trend: the gradual expansion of constitutional decision-making techniques beyond the classical Kelsenian model of simple abrogation. This trend seems closely linked to the region's common socialist heritage, where traditions of constitutional review developed later than in Western Europe, as well as to the constant pressure for harmonisation with the standards of European Union law and the European Convention on Human Rights, which pushes national constitutional courts towards a more active role in closing normative gaps and ensuring effective protection of fundamental rights.

6. Challenges and limits of active constitutional interpretation

The expansion of the function of constitutional courts towards more active forms of interpretation raises some fundamental questions for democratic legitimacy and institutional balance.

First, the more a constitutional court uses interpretative or "additional" decisions, the more it risks infringing on the legislator's monopoly on the creation of new norms, thereby creating tensions with the principle of the separation of powers.

Second, the lack of a clear legal framework – such as the case of North Macedonia, where the Court operates on a self-regulating basis – may create legal uncertainty regarding the limits of the Court's interpretative powers, especially when it comes to the application of new techniques, not expressly provided for in either the Constitution or any organic law.

Third, there is a risk of a "missing dialogue" between the constitutional court and the legislator, in cases where interpretative decisions are not accompanied by clear implementation mechanisms or concrete deadlines for the legislator – a problem that the Croatian model of "guideline decisions" attempts to address more systematically. Fourth, constitutional judicial activism, although it can contribute positively to the protection of fundamental rights and the filling of normative gaps, simultaneously requires careful judicial self-restraint, so that the Court does not lose its legitimacy as a "negative" body, turning into an unelected parallel legislator.

7. Conclusions

The analysis presented in this paper shows that the Kelsenian concept of the "negative legislator", although it remains the necessary theoretical starting point for understanding the nature of constitutional justice, no longer fully reflects the functional reality of contemporary constitutional courts, including that of the Republic of North Macedonia. Through the development of techniques such as interpretative decisions, the assessment of proportionality and the discretionary determination of the temporal effects of decisions, the Constitutional Court of North Macedonia – like its counterparts in Albania, Kosovo, Serbia and Croatia – has in practice shifted the boundaries of its function towards a hybrid model, combining negative and positive elements.

The special institutional status of the Constitutional Court of North Macedonia, as a self-regulatory body without a specific organic law, has facilitated this evolutionary process, giving the Court greater scope to develop its own interpretative methods, but at the same time has left open questions about the transparency and predictability of the boundaries of this competence. The regional comparison shows that the trend towards constitutional judicial activism is not an isolated phenomenon, but a common characteristic of the post-socialist constitutional systems of the Western Balkans, driven by the process of European integration and the practical need for effective protection of fundamental rights. In conclusion, the paper argues that the future of constitutional justice in the region does not lie in returning to a pure "negative" Kelsenian model – which in practice has proven insufficient to respond to the complexity of contemporary societies – but in developing clear, transparent and predictable institutional mechanisms that would allow constitutional courts to exercise a more active interpretative role, without undermining the democratic legitimacy of the legislator and without creating legal uncertainty for subjects of law.

References

[1]. Cappelletti, M. (1989). The Judicial Process in Comparative Perspective. Oxford: Clarendon Press.
[2]. Favoreu, L. (1994). Les cours constitutionnelles. Paris: Presses Universitaires de France.
[3]. Ginsburg, T. (2003). Judicial Review in New Democracies: Constitutional Courts in Asian Cases. Cambridge: Cambridge University Press.
[4]. Kelsen, H. (1928). La garantie juridictionnelle de la Constitution (La justice constitutionnelle). Revue du droit public et de la science politique en France et à l'étranger.
[5]. Kelsen, H. (1942). Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution. The Journal of Politics, 4(2), 183–200.
[6]. Sadurski, W. (2014). Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (2nd ed.). Dordrecht: Springer.
[7]. Kushtetuta e Republikës së Maqedonisë së Veriut (1991, me amendamentet përkatëse).
[8]. Rregullorja e Punës e Gjykatës Kushtetuese të Republikës së Maqedonisë së Veriut.
[9]. Уставен суд на Република Северна Македонија. Одлука У.бр.314/2020. ustavensud.mk
[10]. Уставен суд на Република Северна Македонија. Одлука У.бр.6/2017. ustavensud.mk
[11]. Уставен суд на Република Северна Македонија. Одлука У.бр.55/2018. ustavensud.mk
[12]. Уставен суд на Република Северна Македонија. Материјали и говори на претседателот на Судот на меѓународни средби (достапно на ustavensud.mk).
[13]. Kushtetuta e Republikës së Shqipërisë (1998, me ndryshimet përkatëse).
[14]. Ligji nr. 8577, datë 10.02.2000, "Për organizimin dhe funksionimin e Gjykatës Kushtetuese të Republikës së Shqipërisë", i ndryshuar.
[15]. Kushtetuta e Republikës së Kosovës (2008).
[16]. Ligji nr. 03/L-121 për Gjykatën Kushtetuese të Republikës së Kosovës.
[17]. Ustav Republike Srbije (2006).
[18]. Zakon o Ustavnom sudu Republike Srbije.
[19]. Ustav Republike Hrvatske.
[20]. Ustavni zakon o Ustavnom sudu Republike Hrvatske.