

## THE LEGAL EFFECTS OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

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### -abstract-

The paper *The Legal Effects of the Decisions of the Constitutional Court of the Republic of North Macedonia*, analyzes the issues of the legal effects and enforcement of decisions by the Constitutional Court of the Republic of North Macedonia. The paper emphasized the importance of these two issues, because they directly determine the efficiency of the system of control of the constitutionality of legal acts, as well as provide a monolithic legal system. The author emphasizes that the proof of the importance of this issue is the fact that in comparative constitutional law, this matter is *materia constitutionis* and is regulated in detail by (constitutional and organic) laws for constitutional courts, which is not the case with the Republic of North Macedonia. This paper provides a detailed overview of the constitutional and procedural solutions relating to the legal effect of the decisions of the Constitutional Court, as well as the main factors that determine their enforcement.

**Keywords:** *Constitutional Court, legal effects, decisions, constitutionality, legality.*

### I. INTRODUCTION

The efficiency of the system of control of constitutionality depends not only on the manner the issues for the elements of the procedure for assessment of constitutionality are regulated but also on the effect of the decisions made by the constitutional courts and their observance. "The effects of the control of constitutionality of the laws in the achievement of its basic goal - protection of constitutionality, initially depend on the legal effect of the decisions with which the laws are assessed as (un)constitutional"<sup>1</sup>. The fact that this matter in the comparative constitutional law is *materia constitutionis* and a matter regulated by the (constitutional/organic) laws of the constitutional courts is proof of the importance given to this issue by the constitutional bodies. *Cvetkovski* emphasises that "the constitutional projection is a creation of the basis and a framework of the power of the constitutional courts with their acts to maintain the dynamic equivalence between the freedom of the political opportunity, expressed in the acts of the political power and other holders of the normative action and the obligation for it to be within the

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<sup>1</sup>Од државе која одумире ка правној држави. Славнић Љиљана. Службени гласник. Београд.1994.p.114

frames of the Constitution”<sup>2</sup>. In the case of the Republic of North Macedonia, this matter has been regulated by Article 112 of the Constitution of the Republic of Macedonia and the Rules of Procedure of the Constitutional Court from 1992.

Finally, for the implementation of efficient control of constitutionality, and thus indirectly determining the role and place of the constitutional courts in the system of organization of the government, how the issue of the decisions of the constitutional court and their legal effect will be regulated is extremely important. Namely, for the fulfilment of the principle of constitutionality and legality, through the annulment of any general legal norm that is contrary to the whole legal order, it is necessary for "the acts of the constitutional courts to have legal, authoritative and public character"<sup>3</sup>.

## **II. THE ANALYSIS OF THE PROVISIONS OF THE RULES OF PROCEDURE AND THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA**

The matter referring to the acts adopted by the Constitutional Court has been regulated by the Rules of Procedure of the Constitutional Court of the Republic of North Macedonia. The Rules of Procedure of the Constitutional Court provide for the Constitutional Court to make decisions and rulings. These are the basic legal instruments through which the jurisdiction of the Constitutional Court is exercised and through which the harmonization of the legal system should be achieved.

The Constitutional Court reaches decisions when deciding on the essence of the work, i.e. when deciding in meritum. Decisions are reached regarding:

- Annulment or repeal of a law or regulation, programme and statute of a political party or other general legal act;
- Protection of rights and freedoms from Article 110, indent 3 of the Constitution;
- Resolving a conflict of competencies
- Lifting immunity, for the responsibility and for determining the occurrence of the conditions for termination of the terms of the mandate of the President of the Republic;
- On the immunity and conditions for dismissal of a judge of the Constitutional Court;
- For determining the unconstitutionality of a law, i.e. unconstitutionality and illegality of a regulation or other general legal act at the time of its validity, which ceased to be valid during the procedure, if the conditions for its annulment are being met<sup>4</sup>.

The Constitutional Court makes rulings on:

- Initiating a procedure for the assessment of the constitutionality of a law, i.e. the constitutionality and legality of a regulation or other general legal act;
- Stopping the procedure;

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<sup>2</sup>In addition, Cvetkovski elaborates that how these means will be determined and whether their balance will be maintained or disturbed in one direction or another largely depends on their features, i.e. whether the means to ensure the protection of constitutionality and legality will allow the politics to disrupt the internal harmony of the legal order by its acts, or will represent an unjustifiably rigid limit for the expression and realization of that opportunity. *Цветан ЦВЕТКОВСКИ, Карактерот и правното дејство на одлуките на уставните судови во уставниот систем на СФРЈ (докторска дисертација), Скопје, 1991, р. 54*

<sup>3</sup>*Акти уставног суда у поступку оцене уставности закона*. Драгојловиќ Лука. Правни живот. Београд. 3/81.p. 5-6

<sup>4</sup> Article 70 of the Rules of Procedure of the Constitutional Court

- Rejection of initiatives, proposals and requests;
- Stopping the execution of individual acts or actions adopted based on law, regulation and other general legal act whose constitutionality or constitutionality and legality is being assessed;
- In other cases when it does not decide on the essence of the work<sup>5</sup>.

The lack of an explicit provision that would provide for the Court makes a ruling even when *it does not initiate a procedure for assessing the constitutionality of the legal acts* is the specificity of the aforementioned article. The established practice of the Constitutional Court to adopt Rulings even when it does not initiate a procedure for the assessment of the constitutionality of the disputed acts is a result of analogous interpretation of items 1 and 2 of Article 71, i.e. the Court will make a ruling when not initiating a procedure for the assessment of the constitutionality, that is, when it rejects the initiative to initiate a procedure for assessing constitutionality. On the other hand, the rules of procedure from Art. 70 as regards the conditions under which the Court will render a Decision, does not contain an explicit provision that the Court renders *a Decision if it finds that the disputed act or any part thereof is in accordance with the Constitution*<sup>6</sup>. Contrary to a broader interpretation of Article 71, the Constitutional Court has an exceptionally strict interpretation of Article 70 of the Rules of Procedure, which gives rise to the practice that whenever the Court is unable to reach a decision on cassation, it gives a ruling.

In terms of the practice nurtured by the Constitutional Court, it is specific to give rulings that reject the initiative to initiate a procedure, but which, if being analyzed, leave the impression that the Court has decided on the merits. In this manner, instead of rulings such as acts of the Court rejecting the initiatives for initiating a procedure for procedural reasons, the Court often makes rulings by which in the text of the ruling, the initiative for initiating a procedure is rejected, but in the explanation (commonly really extensive and exhaustive) the Court determines the factual situation, enters into the analysis of the disputed norms, elaborates international documents, points out the practice of other Constitutional courts, etc. An example of this is the Ruling from October 2012, U.No.158 / 2011, by which the Constitutional Court rejects the initiative for the assessment of the constitutionality of Article 1 of the Law on Amnesty and the Authentic Interpretation of the Law on Amnesty or the Ruling (U.No. 341/95) which in item 1 provides for “no procedure for the assessment of the constitutionality of Art. 1 of the Law on Ratification of the Interim Agreement between the Republic of Macedonia and Greece shall be initiated. The conclusion of the Court is extremely confusing to the last Ruling, according to which “*starting from the content of the aforementioned constitutional and legal provisions according to the opinion of the Court, the Assembly of the Republic of Macedonia has a constitutional and legal basis to ratify the interim accord between the Republic of Macedonia and Greece as an international agreement, and on the basis of this to assess that Art. 1 of the Law on Ratification, is in accordance with the Constitution, due to which it did not raise the issue of its compliance with Article 119 of the Constitution.* This only confirms the fact that the practice of the Constitutional Court is based on imprecise rules of procedure. The final effect of this is the room for manoeuvre in which the Court indirectly declares itself on the essence of the dispute, and at the same time gives a ruling rejecting the initiative for assessment of constitutionality.

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<sup>5</sup> Article 71 of the Rules of Procedure of the Constitutional Court

<sup>6</sup> In this manner, the constitutional courts that deliver judgements when deciding on the essence of the dispute, can not only decide on cassation but also reject the petitioner's request with the judgement, which indicates that the constitutional court ruled in meritum and concluded that the request was unfounded.

Finally, all of the above-mentioned only confirm the need for the legal regulation of these issues. It will affect the quality with which this matter will be regulated on the one hand, and on the other hand, it will remove the epithets for the constitutional court as a "decor" in the system, as an authority placed in the role of a norm-maker, and will enable the adoption of acts which will ensure respect for the Constitution, legal certainty, trust and stability of the system.

The provisions of the Rules of Procedure further provide for that decisions and rulings contain data on the submitter of the initiative, the wording of the decision, explanation, names of judges who participated in the adoption of the act and by what majority the act was adopted. The acts of the Constitutional Court are adopted by a majority vote of the total number of judges of the Constitutional Court. The procedure for the responsibility of the President of the Republic of Macedonia is an exception when the Constitutional Court decides by a two-thirds majority of the total number of judges. The decisions of the Constitutional Court of the Republic of North Macedonia are published in the Official Gazette of the Republic of North Macedonia, and if it is a matter of rulings, in the event it is established that they are of greater importance to the public, the Court may decide for them to be published in the official gazette of the republic.

The legal effect of the decisions of the Constitutional Court has been determined by the 1991 Constitution and the Rules of Procedure of the Constitutional Court. The legal effect of the decisions of the Constitutional Court is a *materia constitutionis* and is regulated by the constitutional provisions of Art. 112. Thus, the Constitution stipulates that "the Constitutional Court will repeal or annul a law if it finds that it is not in accordance with the Constitution." "The Constitutional Court will repeal or annul another regulation or general act, collective agreement, statute or programme of a political party or association if it finds that they are not in accordance with the Constitution or the law". „The decisions of the Constitutional Court are final and enforceable"<sup>8</sup>.

According to the Rules of Procedure of the Constitutional Court, "the decision of the Constitutional Court by which a law, regulation or other general legal act is repealed or annulled, produces effect from the day of its publication in the Official Gazette of RSM"<sup>9</sup>.

Decisions of the Constitutional Court have a general binding effect. These are decisions whose effect extends to everyone and anyone (*erga omnes tangit*), and not just to the parties to the dispute. The decisions of the Constitutional Court have a binding effect on all natural and legal persons, as well as the effect of the general legal norms for which the decision of cassation was made<sup>10</sup>.

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<sup>7</sup>For more details on the decisions of the constitutional court see : *Уставниот суд на Република Македонија-дилеми и перспективи*. Дескоска Рената.FORUM EUROPAEUM. Уставниот суд на Република Македонија-статус, дилеми и перспективи. Скопје. 2010. p. 34

<sup>8</sup> Article 112 of the Constitution of the Republic of Macedonia

<sup>9</sup> Article 79 of the Rules of Procedure of the Constitutional Court of RM

<sup>10</sup>The theory often links the aforementioned solution with Kelsen's doctrine of the constitutional court as a "negative legislator" in terms of the fact that the decisions of the constitutional court should replace the repealed law, i.e. the disputed part of the law. However, modern theories of constitutionalism, especially those being developed in the USA, often point to the possibility of adverse events and shifts in the balance between the holders of individual branches of government, which arise as a result of the fact that the court decisions have to fill the legal gap created by the decision of cassation. In terms of the legal effect of the decisions of the constitutional courts that accept Kelsen's European model of control of constitutionality, it is most appropriate to refer to the decision of the Federal Constitutional Court of Germany from 1951, according to which "the judgement declaring a law null and void not only does it have the force of law (Article 31 of the Law on the Constitutional Court), but due to the key grounds of the reasoning for its adoption, it has such a binding effect on all federal constitutional bodies so that a federal law

From the aspect of the time element of the cassation decisions, the decisions of the Constitutional Court have a repealing or annulling effect. With the decision to repeal the disputed legal act, it ceases to be valid from the moment of publication of the decision in the Official Gazette of the Republic of Macedonia. This decision has an *ex nunc* effect and the repeal has an effect in the future. With a decision of annulment, the decision of the Court annuls the act and all the consequences it caused. The decision has a retroactive effect (*ex tunc*). In conditions when the adopted decision will not remove the consequences from the application of the annulled act, the Court may decide to return to the previous state or to compensate the damage caused by the application of the annulled act. The statistical data of the work of the Constitutional Court of the Republic of Macedonia present a picture of the contrarian of the Court in making decisions by which the disputed acts are annulled. Thus, in 2012 23 acts were repealed and 5 were annulled, in 2011 31 disputed acts were repealed and only 1 was annulled, in 2010 the ratio was 51 repealed versus 6 annulled acts, in 2009 51 acts were repealed and 7 acts were annulled<sup>11</sup>.

The decision U.No.66 / 2010 by which the Constitutional Court repeals provisions of the Law on Spatial and Urban Planning, based on which acts of local self-government unit were adopted is in favour of the statistical data on extremely restrictive actions of the Court in adopting annulling decisions. It leaves the legal entities that exercised their rights during its validity without the right to compensation, which does not go in favour of the protection of the principle of equality and finally the principle of legal certainty.

From the aspect of the scope of cassation, the disputed legal act can be revoked or annulled in its entirety (full cassation) or only certain provisions or parts of the acts subject to constitutional control (partial cassation) can be cassated by the decisions of the Constitutional Court. In terms of this issue, the practice of the Constitutional Court of the Republic of Macedonia does not differ much from the practice of other European constitutional courts, so in terms of scope, decisions usually provide for the partial cessation of the impugned act. This is another technique of self-restraint that the court practice, because they avoid a frontal conflict with the legislature and actualize the issue of counter-majoritarian difficulty, avoid the role of the constitutional court as a positive legislator, avoid creating legal gaps in the legal system, and the principle of legal certainty is being strengthened.

Finally, in the aspect of the legal effect, the decisions of the Constitutional Court are final and enforceable. The use of any legal means against them is not allowed and there are no legal obstacles to executing them after their publication in the Official Gazette.

In conditions when a decision has been made which annul or repeals the disputed article or part of the act subject to the control of constitutionality, the resulting legal gap is filled with a new norm adopted by the authority whose act is revoked or annulled. In conditions when the competent authority has an ignorant attitude towards the decision of the Constitutional Court, the executive authorities (Government of the Republic of Macedonia) are competent to ensure its execution<sup>12</sup>.

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with the same content cannot be re-adopted". See B VerfGe 1,14 .1951 . Избрани одлуки на Сојузниот уставен суд на СР Германија (јубилејно издание) Konrad Adenauer Stiftung.2009.

<sup>11</sup> See Преглед или Осврт на работа на Уставниот суд на РМ за работа на Судот за наведените години од <http://www.ustavensud.mk/domino/WEBSUD.nsf>

<sup>12</sup> In 1997, the Government of the Republic of Macedonia intervened in the execution of the decision of the Constitutional Court of the Republic of Macedonia regarding a ban on displaying the flags of the national minorities in front of the seat of the bodies of the local self-government units in Tetovo and Gostivar. For more details see: *Уставно право*. Шкарик Светомир, Силјановска Давкова Гордана. Скопје. 2007.р. 782

Enforcement of decisions of the Constitutional Court is a challenge for any system of control of constitutionality. Several factors influence the determination of the efficiency of the system of control of the constitutionality, as follows:

- the legal framework of the constitutional court - as an example of the fact that the established constitutional and legal solutions directly determine the execution of decisions, and thus affect the efficiency of the system of constitutional control, such are the decisions of 1963 and 1974 with the implementation of which the Macedonian constitutional judiciary has experience. Thus, the marginalization of the position of the Constitutional Court in the system of organization of government and non-execution of its decisions is the final product of the rulings that provide for the execution of the decisions of the Court after the expiration of a certain period of time and the so-called "special letters" without binding character, as a form of communication with the legislative authority.
- the relations of this authority with the other authorities in the system of organization of the government - are determined on two levels:
  - 1) legal framework - the *Constitution of the Republic of Macedonia* generally determines the relations between the Constitutional Court and the Assembly of the Republic of Macedonia through the provisions that regulate the issues for the election of judges of the Constitutional Court and their dismissal. There is no constitutional basis for the adoption of the *Law on the Constitutional Court*. The *budget* is the second powerful instrument used for determining the relations of the Constitutional Court with the Assembly of the Republic of Macedonia, that is, the Government of the Republic of Macedonia which is the only one authorised to submit a proposal for its adoption. The national reports of the Constitutional Court concluded that although the Constitutional Court prepares a Draft Budget for the Constitutional Court at the end of each year which is submitted to the Ministry of Finance, it is very common to be approved with 20% less financial means for its work<sup>13</sup>. „The “money power” is an exceptional tool for influencing the work of the Court, which also determines the relations of this authority with the other authorities in the system of organisation of the government. and 2) the established practice - the Constitutional Court has an inconsistent attitude towards the possibility for all acts of the Assembly of the Republic of Macedonia that do not have a status of law but do have erga omnes tanguit status, to appear as a subject of control of constitutionality. From the so far practice, it is evident that the Rules of Procedure of the Assembly of the Republic of Macedonia are susceptible to control of constitutionality, which cannot be said for the Conclusions adopted by the Assembly for which the Constitutional Court stands firmly on the belief that they regulate the relations among certain number of persons and are internal and concrete acts (regulate internal relations) of this authority. On the other hand, the persistence and determination of the legislative authority to implement certain policies translated into the laws adopted by it are evident, even when the Constitutional court declared its opinion and repealed or

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<sup>13</sup>Уставна правда: функции и односи со други јавни органи. Национален извештај на Уставниот суд на РМ. 2011. and Проблематиката на законодавниот пропуст во уставно-судската практика. Национален извештај на уставниот суд на РМ. 2007. [www.ustavensud.mk](http://www.ustavensud.mk)

annulled them, emphasising their unconstitutionality. In the context of the aforementioned, the Assembly of the Republic of Macedonia applies two techniques: A) by amending and supplementing the laws for which a cassation decision has been adopted, the Assembly reintroduces provisions for which the Court already ruled them unconstitutional. The example with the Law on Additional Requirements for Performing Public Function followed by a decision of the constitutional court, the Law Amending the Law on Additional Requirements for Performing Public Function, followed again by a decision for the unconstitutionality of the disputed decisions, then adoption of a new law which regulates this matter and a proceeding pending before the Court. The manipulative behaviour of the legislative authority in these conditions raises the issue of counter-majoritarian difficulty causing ping-pong effect, which finally does not influence the provision of the principle of constitutionality and legality, or a more specific category of persons covered by the law, protection of the principle of legal certainty and principle of equality. B) The second technique is the introduction of already repealed norms of law, in the legal text of another law, as in the case of U. No 140/2009 by which the Constitutional Court repeals provisions of the Law on the Legal Status of the Church, Religious Community and Religious Group in which provisions were introduced which were repealed by the Decision of the Constitutional Court U. No. 202/2008 of April 2009, but refer to the Law on Primary Education<sup>14</sup>

- finally, the will of all actors in the political system to provide respect and execution with the decisions of the Constitutional Court is a necessity primarily for the protection of the Constitution, protection of the principle of constitutionality and legality and the principle of legal certainty.

### III. CONCLUSION

The constitutional court literature emphasizes that the establishment of the system of constitutional and judicial control of constitutionality consequently imposes the second important question - the question of the legal effect of the decisions of the constitutional courts. As Slavnic has emphasized “the effects of the control of constitutionality of the laws in the achievement of its basic goal - protection of constitutionality, initially depend on the legal effect of the decisions with which the laws are assessed as (un)constitutional”<sup>15</sup>. Finally, the efficiency of the system of control of constitutionality depends not only on the manner the issues for the elements of the

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<sup>14</sup> Namely, the landscape of the chronologically placed acts would look like this: 1) Law on Primary Education which provides that religious education can be implemented in primary school as an optional subject (Article 26). 2) Decision of the Constitutional Court U. No. 202/2008 of April 2009 which annuls the disputed Article 26 under the explanation that the legal solution violates the academic and neutral character of the state. 3) Law on the Legal Status of the Church, Religious Community and Religious Group, regulating the matter of establishment, the legal status of religious communities, organisation of the religious service, prayer, religious rite, religious teaching, provides for that the religious education can be organised in all educational institutions as an optional subject, conducted by persons meeting special requirements for this goal, as well as an obligation for parent or custodian permission for listening religious education of persons under 15 years of age. (The already repealed provisions are included in a new law). 4) Decision of the Constitutional Court U. No. 104/2009 of September 2010 which repeals the disputed articles 27, 28 and 29.

<sup>15</sup> *Од државе која одумије ка правној држави*. Славнић Љиљана. Службени гласник. Београд. 1994. п. 114

procedure for assessment of constitutionality are regulated, but it is directly determined by the effect of the decisions made by the constitutional courts and their observance. Exactly because of this meaning, it is a matter that should be regulated by the constitution (*materia constitutionis*) and elaborated in detail by law, which is not the case in the Republic of North Macedonia.

The constitutional provisions and the provisions of the rules of procedure that constitute the legal framework regulating the matter of the Constitutional Court, on the other hand, are one of the basic factors that determine the execution of its decisions. However, in addition to this factor, it is conditioned by the relations of the Constitutional Court with other authorities in the system of organization of government, and even more importantly by the (non) existence of the will of all actors in the political life, to ensure their observance and execution.

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