*Jelena Trajkovska-Hristovska**

THE CHARACTER AND LEGAL EFFECT OF THE DECISIONS OF THE CONSTITUTIONAL COURTS

(Comparative overview of the European models of control of constitutionality)

-abstract-

The establishment of the system of control of the constitutionality of acts by the constitutional court consequently imposes one very important issue - the issue of the legal effect of its decisions. The efficiency of the system of control of constitutionality depends directly on the effect of the decisions that the constitutional courts make. The fact that this issue is *materia constitutionis* in comparative constitutional law and issue that is regulated by the laws (acts) for the constitutional courts, is the most significant evidence of its importance.

The paper will present a comparative overview of normative frame regarding the character and legal effect of the decisions of the European constitutional courts. The paper will analyze the decisions of the constitutional courts of Germany, the Republic of Italy, as well as the character and legal effect of the decisions of the Constitutional Court of Republic of Slovenia. The paper will analyze the interpretive decisions of the constitutional courts, whose adoption deviates from the classical understanding of the role of the constitutional court as a negative legislator. Therefore they are assessed as a possible mechanism for the court to operate outside the established functions and competencies.

***Key words**:* Constitutional court, control of constitutionality, interpretative decisions, cassation decisions, manipulative decisions.

I. INTRODUCTION

The establishment of the system of constitutional and judicial control of constitutionality, consequently imposes a very important issue - the issue of the legal effect of the decisions of the constitutional courts. *Slavnic* emphasizes that "the effects of the control of the constitutionality of the laws in achieving its main objective - the protection of the constitutionality, initially depend on the legal effect of the decisions that assess the (un)constitutionality of the laws"[1]. The fact that in the comparative constitutional law this issue is *materia constitutionis* and an issue regulated by the acts on the constitutional courts, proves its importance. The efficiency of the system of control of constitutionality depends not only on the manner of which the issues for the

* Jelena Trajkovska Hristovska, PhD, Associate Professor, Ss. Cyril and Methodius University in Skopje, Iustinianus Primus Faculty of Law, e-mail: j.trajkovskahristovska@pf.ukim.edu.mk

[1] *Од државе која одумире ка правној држави*.Славнић Љиљана. Службени гласник. Београд.1994.р.114

elements of the procedure for control of constitutionality are regulated, but also on the effect of the decisions that the constitutional courts make and their observance. *Cvetkovski* emphasizes that "constitutional design is the creation of a basis and framework for the power of the constitutional courts, by their acts, to maintain the dynamic balance between the freedom of political opportunity, expressed in the acts of political power and other holders of normative activity and the obligation for it to move within the Constitution"[2]. Finally, the manner in which the matter of the decisions of the constitutional court and their legal effect will be regulated is extremely important 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 government. Namely, for the purposes of the implementation of the principle of constitutionality and legality it is necessary for "the acts of the constitutional courts to have a legal, authoritative and public character"[3].

In the legal literature, the legal effect of decisions is being considered in two ways.

The first way connects the legal effect of the court decisions with the type of the dispute for the control of constitutionality (abstract or accessory).

- In case of direct, abstract dispute for assessment of the constitutionality of the acts, the effect of the court decision is erga omnes and has more profound consequences. Thus, the court decisions that cassate the unconstitutional legal acts (decisions on repeal or annulment of the disputed act) achieve the objective of constitutional judiciary, i.e. position the constitutional court as a body that "watches" over the constitution and protects it from the legislator.
- In the second case, i.e. in conditions of conducting a specific, accessory dispute, the decision of the court is more limited and it acts only on that specific dispute. These decisions do not oblige in the future the court that made the decision, nor the other courts in resolving other such disputes. Namely, the legal effect of these decisions is used only on the specific dispute on the occasion of which the issue of assessment of constitutionality was raised.

Thus, in systems with dispersed control of constitutionality by all courts (e.g. the United States), the court decisions have effect only on the specific dispute over which the issue of constitutionality has been raised. On the other hand, in systems with centralized control of constitutionality exercised by one authority, decisions have a wider effect.

I. EFFECT OF THE DECISIONS OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY

i. *Cassation decisions*–According to the constitutional and judicial literature the term cassation refers to the effect of the constitutional courts decisions adopted in a procedure of abstract control of the constitutionality of legal acts, which repeal or annul certain provisions or the act as a whole.

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

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

The Federal Constitutional Court of Germany renders annulment decisions with ex tunc effect. The decision refers to the legal relations that have arisen on the basis of the unconstitutional act, before the adoption of the decision by the Court. This gives the impression that the system provides priority of protection for the principle of fairness at the expense of the principle of legal certainty. The decisions of the Federal Constitutional Court have the force of a law, and this refers to the decisions by which a legal act is being annulled, as well as the decisions by which their compliance with the basic law is being established.

Finally, the act that is subject of the control of unconstitutionality, is considered null and void from the day of its adoption. The effect of the decisions of the Federal Constitutional Court is erga omnes.

The effect of the annulment decisions is related to the act subjected to control, and not to the decision made by the Constitutional Court, because it is considered that the decision is only a basis for determining the unconstitutionality of the legal act. Thus, the Federal Constitutional Court, referring to the provisions of the normative framework, in one of its decisions emphasizes that "a judgment declaring a law null and void not only has the force of law (Article 31 of the Law on the Constitutional Court), but because of the reasoning for its adoption as well, has such a binding effect on all federal constitutional bodies, that a federal law with the same content may not be adopted again. If the Constitutional Court finds that a law adopted after the entry into force of the Constitution is null and void, because it is contrary to the Constitution, it would not have a legal effect from the very beginning"[4].

ii. Interpretive Decisions - The basic principle of the control of constitutionality of normative acts in the Federal Republic of Germany is *to interpret the law in accordance with the Basic Law, whenever possible*[5]. The aforementioned principle represents the basis of the doctrine of judicial self-restraint and a mechanism whose main goal is to prevent the occurrence of the rule of courts (*government by judiciary*) or court activism (*judicial activism*). This is the guiding principle by which the deviation from the classical principle of separation of powers should be avoided.

To accomplish this basic principle, the Federal Constitutional Court of Germany, through more than 60 years of practice, seems to create revolutionary solutions by which it skilfully transforms the self-restraint mechanisms into activist mechanisms. In order to get a clearer picture of the aforementioned, the three basic types of interpretative decisions made by the Court are given as examples, which create a completely different picture of the practice of this authority through three more intellectual moves. Thus, these interpretative decisions seem to transform the Federal Constitutional Court from Kelsen's original concept of a "negative legislator" into a "positive" and "parallel" legislator. That is why it is often mentioned that "the Federal Constitutional Court of Germany is the most striking and exciting institution created by the Basic Law for the Federal Republic of Germany"[6].

The following are the interpretive decisions of the Federal Constitutional Court:

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[4] В VerfGe 1,14 .1951 . Избрани одлуки на Сојузниот уставен суд на СР Германија (јубилејно издание) Konrad Adenauer Stiftung.2009.

[5] *The Constitutional Jurisprudence of the Federal Republic of Germany*. Second edition. Kommers.P Donald. Duke University Press. Durham and London. 1997. p.51

[6] *The Constitutional Courts as veto Players. Lessons from Germany, France and US.* Broyard Sylvain &Hönnige Christoph.Annual Midwest Political Science Association Conference. 2010. P. 10

- ***Method of interpreting the law in accordance with the constitution***. The obligation of the Court to interpret the laws in accordance with the Basic Law is the basic principle according to which the model of control of the constitutionality of the acts before the Constitutional Court is implemented. This means that whenever the law encompasses a construction that can be interpreted differently as (not)harmonized with the constitution, the Federal Constitutional Court should interpret the law as constitutional. The only limitation in the Court's interpretation is that the interpretation of the constitutionality of the law does not distort the meaning of the other provisions of the law. In this manner Kommers points out that the Federal Constitutional Court, by nurturing this practice of interpreting constitutional norms, leaves wide space for the legislature to err"[7]. Namely, in addition, it should be pointed out that when interpreting legal provisions, attention should be paid not only to their harmonization with the Basic Law and positive norms, but also to the fact that they should not contradict the meta-legal rules and values of modern German constitutionalism such as human rights and dignity, rule of law, principle of proportionality, legal certainty, clarity and predictability. Guided by this, the Federal Constitutional Court will not annul the laws subject to control unless it establishes that they contradict some of the above-mentioned principles. It seems that the determination of a different meaning of the norms, which is not identical with the initial decision of the legislator, in order to avoid the annulment of the law, is made by the Federal Constitutional Court - a norm-maker, not by a negative legislator. The aforementioned technique is applicable only if "the will of the legislator is not too clearly expressed or if the survival of the norm as such in the court interpretation does not directly contradict the law itself"[8].
- ***Establishing unconstitutionality of the law without its annulment*** - The establishment of the unconstitutionality of the law without its annulment is the second form of interpretative decisions by the Federal Constitutional Court. The Court uses them to give instructions on how to remove the anomalies of the law that contradict the Basic Law, which is another indicator that the Court manifests the will of the creator of the legal norms. The decision has no erga omnes effect, because the law has not been annulled. Judges of the Federal Constitutional Court emphasize that this type of interpretative decision is most appropriate in control of the constitutionality of the legal acts that violate the principle of equality by some of their provisions, such as the provisions prohibiting evening job to women (BVerfGE 85, 191 -211), the right to register the residence of a child born in Germany to non-German parents, which depends on mother's

[7] *The Constitutional Jurisprudence of the Federal Republic of Germany*. Second edition. Kommers.P Donald. Duke University Press. Durham and London. 1997. p.51

[8] *Ustavnisudkaoaktivninormotvorac.*Stanković Marko. Pravnizivot. Br.12/2011.Beograd. 2011. P. 894.

residence but not father's (BVerfGE 114, 357 -371)[9]. For this type of interpretative decisions, it is common to set a deadline within which the legal provision can be applied, although contrary to the constitution, and in which the legislator will be obliged to remove the reasons for its annulment. The length of the deadlines is different and it varies from 1 to 2 years. The normative framework does not stipulate the deadlines within which the legislator will have to harmonize the disputed provisions with the constitution and they depend on the assessment of the court and the specifics of each specific case (e.g. the decision on the rights of non-smokers in pubs (BverfGE 121, 317 -373) or the decision on the right of the persons who have changed their gender to change their name (BverfGE 121, 175, 204) – deadline of 2 years.

- ***Declaring law constitutional with a note to remove certain shortcomings so the law would be "absolutely constitutional".*** Similar to the above-mentioned, these interpretative decisions of the Federal Constitutional Court enter into force after a certain period provided that the legislator would not repeal the provisions that need to be harmonized with the Basic Law. Namely, these decisions of the Constitutional Court do not declare the laws null and void nor state their unconstitutionality, but prejudice the constitutionality of the law with the category "temporarily constitutional", instructing the legislator what measures should be taken. They are often referred to as decisions to delay the annulment of the laws.

Finally, the adoption of the interpretative decisions by the Federal Constitutional Court will have a strong impact on the work of the Constitutional Court of Italy, which, guided by Germany's good experience, will accept the established practice, first because of the need to harmonize the relations of this authority with the legislator and then with the other courts in the judicial system. It has been highlighted that the inherited authoritarian legislation, with a risk of its "revival" if cassation decisions are made with an annulment effect, which inevitably lead to legal gaps is the basic motive for adopting interpretative decisions in Germany and Italy[10]. These decisions establish the unconstitutionality of the disputed provisions or acts, but do not annul them, leaving a deadline the legislator to remove them by amending them.

The adoption of the interpretive decision deviates from the classical understanding of the role of the constitutional court as a negative legislator and in theory is assessed as a possible mechanism for the court to exercise activity outside the established functions and competencies. However, experience has shown that the German model of control of constitutionality, although the Federal Constitutional Court is often considered as the most activist European Constitutional Court, ensures the protection of the constitutional order as a whole. This can be especially established on the basis of the types of the procedures that are implemented before it, the forms of control of the constitutionality that it conducts and the mechanisms of protection of the rights.

[9]*Constitutional justice: functions and relationship with the other public authorities.*Lübbe-Wolff Gertrude, Rudolf Mellinghoff Rudolf,GaierReinhard. National report prepared for the xv Congress of Conference of the European Constitutional Courts by Federal constitutional Court of Germany. P.14

[10]*Ustavnisudkaoaktivninormotvorac.*Stanković Marko. Pravnizivot. Br.12/2011.Beograd. 2011. P. 895

II. EFFECT OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF ITALY

i. Regarding the question of the legal effect of the decisions, the model of control of constitutionality in Italy seems to leave room for the so-called "third wave" of the development of the constitutional and judicial control of constitutionality.

The aforementioned, of course, cannot be established if we take into account the cassation decisions of the Constitutional Court. Namely, regarding this type of decisions by which the court approaches the acceptance of the proposal for control of constitutionality and decides on the merits (*sentenza di accoglimento*), the Constitutional Court of Italy acts in the capacity of the so-called Kelsen's "negative legislator"[11]. This means that if the court establishes unconstitutionality of a law or some part of it, it would repeal it (decision of cassation).Thus, in accordance with Art. 136 of the Constitution of Italy, the law that is contrary to the Constitution does not produce legal effect starting from the day after the publication of the decision of the Constitutional Court in the official gazette. The decision of the Court is final, it has erga omnes effect, regardless of the fact that the procedure for control of constitutionality was raised by a court from the regular judiciary before which a specific dispute was adjudicated[12]. The practice of the Constitutional Court to repeal only parts of the law and not the whole law in order to avoid the so-called "legislative vacuum" needs to be mentioned here. This is done in such a way that the court determines precisely which legal provision is not harmonized with the constitution, often by replacing it with a new one, extracting it directly from the constitution or an existing law. This method leads to the so-called "**manipulative decisions**" of the court in the sense that the Court "creates law". The Court creates new non-existent norms in the law, introduces new elements, directly from the constitution or existing laws, in order to harmonize them and make them compatible with the Constitution. These manipulative court decisions raise the question of

[11]Kelsen's centralized model of constitutional and judicial review of constitutionality is based on the concept of a "negative legislator". This limits the role of the constitutional court in the abstract control of constitutionality and the logical conformity of the law with the constitution. Assuming that the abstract control of the constitutionality of the law has not been initiated in connection with a specific dispute, Kelsen concludes that the assessment of constitutionality is closer to the legislative than to the judicial function. The Constitutional Court is a logical complement to the work of the parliament. The latter, for two reasons: a) avoids the possibility of all regular courts to oppose the will of the legislator by the exception of the unconstitutional legal provisions in specific disputes and b) by ensuring erga omnes effect of the decisions of the constitutional court, the regular judiciary is subordinated to the laws of the parliament, while ensuring the supremacy of the constitution. The cessation of the legal provision is nothing but placing another degree in the hierarchy of acts, so the repeal, i.e. annulment of the law has the same degree of generality as its creation, which has as a final consequence the creation with a negative sign. Finally, the role of the constitutional court is to be the guardian of the constitution and the supremacy of the constitution, and this would be possible only if it protects the constitution and the legislator iself, who originally has the authority to create legal norms. For more details see: *Ustavnisudkaoaktivninormotvorac.–o interpretativnimodlukataustavnihsudova*.StankovicMarko.Pravnizivot-casopiszapravnuteoriju I praksu.Br.12/2011/Kniga 550 1-984 Beograd.

[12]The issue of the validity of the decisions of the Constitutional Court is related to the relationship of the Constitutional Court with the legislative authority. Namely, when some of its laws or part of a law are being repealed by the Constitutional Court, the parliament can not adopt a new law, i.e. a provision with identical content to the one that the court has already repealed. There is a theoretical possibility for the provision or the law to be adopted with identical content only if they have the force of constitutional provisions, i.e. if they are adopted in the form of a constitutional law, which in practice can be implemented only in a constitutional review procedure. The aforementioned theoretical possibility can be excluded if it is about a law or some of its provisions that are contrary to the constitutional provision prohibiting the change of the republican form of government.

whether *the court has been transformed into a "positive legislator", exceeds the usual objectives that constitutional courts should achieve in the Kelsen sense of the word and can be accused of activism* or, conversely, *the court applies self-restraint techniques, in the sense that it undertakes everything for the law not to repeal it in its entirety, to preserve it in the legal order, and protecting the constitution, it decides on such a method in order for the law to be harmonized with it*.

The Constitutional Court of Italy has shown exceptional creativity regarding the decisions it adopts in terms of the assessment of the constitutionality of laws. Thus, according to the constitution and the constitutional laws, the court makes decisions by which it decides on the merits of the constitutionality of the law:

- **Decisions rejecting the proposal for control of the constitutionality of the law** (*senteza di rigetto*). With these decisions of the court, the proposal for control of the constitutionality of the law has been rejected, i.e. the question has been assessed as "unfounded", so the law remains in force. These decisions have no erga omnes effect and refer only to the specific court case on which the issue of assessing the constitutionality was raised. This means that, on other grounds, with a different argument in relation to another specific court dispute, another court may reraise the question of the constitutionality of the same law. In such circumstances, the Court rarely makes contradictory decisions, however there is always a possibility of this in the event of a change in the composition of the court, or more often in a change of interpretation or understanding of the manner in which the disputed provision would apply. The decisions No. 64/61 and No. 126/68 are examples of this. Namely, with the first decision, the Court did not determine the unconstitutionality of the provision according to which the adultery of the woman should be incriminated, so that seven years later the court determined the opposite on the grounds that the same provision violates the principle of equality.
- **Decisions accepting the control of constitutionality of acts and repealing the unconstitutional law** (*sentenza di accoglimento*). With these decisions, the law, i.e. some part of it is repealed. They have a wider legal effect, do not refer only to the specific dispute on which the issue of assessment of constitutionality was raised (they have an erga omnes effect) and are final.

In terms of the types of decisions that it makes, the aforementioned creativity manifested by the Constitutional Court of Italy comes to the fore when making the so-called Declarations of Unconstitutionality. Namely, these include:

- ***The interpretative decisions (sentenze interpretative)*** which include the interpretative judgment on the constitutionality of the acts and the interpretative judgment on the annulment of the law. *The interpretative judgments on the constitutionality of the act*, the so-called *corrective decisions* are decisions that reject the proposal for annulment of the disputed law, provided that the disputed provisions are given a precise meaning. With these decisions, the court refuses to decide in meritum on the constitutionality of the law and confines itself to concluding that the judge who should apply the law in a particular case and who initiated the procedure for assessing the constitutionality, misinterpreted it. Namely, the Constitutional Court of Italy resorts to making this kind of decisions and its actions are justified by the fact that the law should not be declared unconstitutional and annulled only because the authorized proposer interpreted it

differently. Thus, the court gives its own interpretation of the disputed legal provision, contrary to the interpretation of the proposer of the procedure.
Interpretive decisions can also be made in the form of *interpretative judgments to repeal the law*. With these judgments, the disputed legal provision is declared unconstitutional, but only to the extent and the meaning that the provision is being attributed as contrary to the constitution by the court that initiated the procedure for assessing constitutionality. In this type of decisions, the Constitutional Court expresses its opinion, which is a novelty, in the enacting clause of the decision, but the law does not annul it or remove it from the legal system. These decisions of the Constitutional Court, although they provide a constitutional interpretation of the disputed legal text, have no erga omnes effect and refer only to the court that initiated the procedure for assessing constitutionality. These decisions of the Constitutional Court, although they provide a constitutional interpretation of the disputed legal text, have no erga omnes effect and refer only to the court that initiated the procedure for assessing constitutionality. However, although judges are not bound by this decision of the Constitutional Court and may in other cases interpret the disputed legal provisions differently, they respect and apply it. Even in case of a different opinion on the constitutionality of the legal provision, even in the case when the courts refuse to implement it in resolving a specific court dispute, they cannot circumvent the established unconstitutionality of the legal norm that they should apply, without re-initiating, for the same matter, the proceedings before the Constitutional Court.

- ***The judgment for partial annulment of the law*** is not categorized in the interpretative decisions of the Constitutional Court of Italy. Groopi points out that "faced with the tendency the courts to disregard the legal interpretations of interpretative decisions, the Court is pursuing the practice of overcoming the structural limitations of this type of decisions and accepting a proposal to assess constitutionality"[13]. In such cases, the Court considers the different meanings of the contestable provisions and declares the provision unconstitutional only if it is clearly contrary to the Constitution. In this case the law remains in the legal life and produces legal effect, with the exception of the provision, i.e. its part which the Court deems to be contrary to the Constitution.

ii. Assuming that the interpretative decisions of the Constitutional Court of Italy refer to the relationship of the constitutional court with the other courts, the relationship of the Constitutional Court with the legislator is explained by another type of decision made by the court. This includes:

- ***Additional decisions****,* as a type of decisions by which the court declares the law unconstitutional, not because of the objectives that the act achieves, but because of the objectives that the law does not achieve. To ensure the achievement of the goals, the court introduces new provisions in the legal text. With these decisions, the Constitutional Court not only assesses the constitutionality of the law that is subject to evaluation, but also considers the issue of its expediency. Therefore, for this type of decisions it can be concluded that they are positioned at the very limit

[13] *RalationshipBetween Constitutional Courts, Legislator and Judicial power in the European System of Judicial Review- Towards a Decentralized System as an Alternative to the Judicial Activism.* Tania Groopi. Conference on judicial activism and restraint theory and practice of cvonstitutional rights.Stassbourg. 2010 P.6

of the powers of the Constitutional Court in the Kelsen's sense of the word. Namely, their adoption can even be considered as a manoeuvring penetration in the sphere of the legislator and abandoning the conventional understanding of the role of the constitutional court as a "negative legislator". However, the Italian authors do not criticize the established practice of the Court to make additional decisions for two reasons only: 1) "in many cases the usual nullification of the law does not solve the problem that initiated the constitutional issue, so the introduction of an additional rule that is missing is the only way to remove the violation of the constitutional value that the Court should protect, and 2) the creative impact of the court is limited to the so-called "obligatory verses" or "obligatory rhyme", which means the introduction of provisions that are logically necessary in the normative context, excluding the possibility of discretion and choice"[14]. Finally, it should be emphasized that the above-mentioned decisions are made only in cases of urgency, i.e. in cases that require urgent action of the court facing with a specific court dispute, prejudicially raises the issue of constitutionality of the law in question.

- ***The additional principles (additive in principio)*** are decisions aimed at reducing the possible influence of the Constitutional Court on the work of the legislator. Namely, with these decisions, the court does not introduce new rules in the legal system, but only universal principles. The indication of the necessity of adoption of acts by the legislator by which the set principle(s) of the court decision will be implemented is differentia specifica of this type of decisions. In this way, the additional principles, as a type of decisions of the Court, conditionally accept the constitutionality of the law that is subject to control by emphasizing the need to further regulate the matter with provisions that will be in accordance with the established principles. Thus, additive in principio are assessed as a mechanism that skilfully ensures the balance between the Court and the legislator, providing only further guidance and not repealing the law of parliament. However, the determination of the manner in which the disputed laws for which the so-called additional principles will be implemented in specific litigation by the regular judiciary is the disadvantage of the adoption of these decisions. In this context, it must be noted that the legislative authority respects the decisions of the Constitutional Court and, in order to preserve the constitutionality of the law, accepts the principles highlighted in the decision of the Court. In case before the regular courts the need for the application of the disputed law before the procedure of the legislation arises, there is a possibility for the court to directly refer to the decision of the Constitutional Court and to act upon it.
- Another type of decisions that the Constitutional Court of Italy makes are the so-called *reprimand* decisions (repetitive decisions or decisions to be followed) (*doppiepronounce*). The court develops the practice of making such decisions in conditions when it needs to make decision on to the so-called politicized issues. In such circumstances, the court leaves time for the legislator to amend the law and to harmonize it with the Constitution, pointing out its unconstitutionality in the decision, although it does not do this explicitly. Therefore, these opinions of the

[14]*The Italian Constitutional Court: Towards a Multilevel System of Constitutional review.* Tania Groppi. 2010. p. 108.*www.astrid-online.it/.../Italy-constitutional-Court-JCL_T_Groppi.pdf*

Constitutional Court suggest that in conditions when the Court would approach the control of constitutionality, the disputed law would be repealed and would bring the so-called (*sentenza di accoglimento*), and that it expects the legislator to follow his reprimand and harmonize the disputed law with the Constitution. In case the parliament does not act in the so-called reprimand decision of the Court, in the next proposal for assessment of the constitutionality of the specific law, the Court will adopt a revoking decision.

- Finally, the ***decisions that will enter into force after a certain period of time*** are the last type of decisions by which the Constitutional Court may avoid an antagonistic relationship with the parliament. In terms of the aforementioned, it must be established that the Constitutional Court of Italy has taken this practice from the practice and legal solutions governing the work of the Constitutional Court of Austria and guided by this, its creativity cannot be emphasized. However, the constitutional experience has shown that when the Court decided on issues of a political nature and issues that imposed the need to balance the social rights of the citizens and the economic measures which the state must undertake, this kind of decisions showed the desired results with delayed effect.

  In Italy, Court decisions accepting the constitutionality of an unconstitutional law temporarily and for a limited period of time are intended to provide the legislature with sufficient time to review the disputed law and to remove the unconstitutional legal provisions. *Groopi* and *Rolla* point out that these decisions of the Constitutional Court on deferred unconstitutionality, in which the Court "balances different constitutional values, contain the date on which the law will be nullified (repealed)[15].

Finally, the reasons for developing the practice of interpretive decision-making of the Constitutional Court of Italy should be sought in the Court's obligation to remove elements of totalitarianism from the previous regime in post-war Italy, the inertia of the Italian Parliament, the absence of political compromise, and the institutional solution for the bicameral structure of the legislature, which often imposes the need, in conditions of urgency, the Court to act as a positive legislator.

III. EFFECT OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF SLOVENIA

According to Article 1 paragraph 3 of the Law on Constitutional Court, "the decisions of the Constitutional Court are legally binding". Judge *Testen Franc*, interpreting this legal provision, established that it leaves room for extensive interpretation on the one hand, and on the other hand it can be interpreted restrictively. Thus, he emphasized that the provision is too extensively set because the binding force is per se mark of every decision of a state authority, i.e. the specific subjects of the procedure or in certain cases the subjects that are not part of the procedure are placed under the so-called legal obligation. On the other hand, the provision can be interpreted restrictively as well, because it lacks an indication of the entity that is obliged to it, which parts

[15] *Between Politics and Law: The development of the Constitutional Review in Italy.* Giancarlo Rolla&TaniaGroppi.*Constitutional Justice, East and West*.Edited by WojciechSadurski.Kluwer Law International.2002. p.153

of the decision are legally binding, what is the sanction for its non-compliance, as well as the lack of indication of the entity that should implement it.[16]
The decisions of the Constitutional Court are one of the determinants of the relationship of this authority with the legislative authority. Namely, it depends on the decisions made by the Constitutional Court how much this authority will remain in the limits of its own powers and how much it will implement the initial Kelsen idea of the so-called *negative legislator* on the one hand, and on the other hand the type of the decisions will be a direct indicator of the frequency with which the constitutional court enters the constitutional space of the legislator and performs the function of the so-called "*positive legislator*". Exercising the aforementioned function entails the danger of the emergence of activism of which the modern constitutionalism fears, because it ultimately causes deviation from the traditional concept of separation of powers, and carries with it the danger of Bickel's anti-majority difficulty.
Regarding the procedure for the assessment of the constitutionality of the legal acts, the decisions of the Constitutional Court of Slovenia are classified into:

i. Cassation decisions - Constitutional provisions of Art. 161 provide for that in the event the Constitutional Court determines the unconstitutionality of a law in a procedure, it makes a decision of cassation, which refers to the whole law or a part of it. These decisions enter into force immediately or within a certain period of time (which cannot be longer than one year) determined by the Constitutional Court[17]. The aforementioned decision on the deadline for their execution is another indicator of the influence of the Austrian and German experience in creating the decisions for the constitutional and judicial control of the constitutionality of the acts in Slovenia. Thus, the Constitutional Court may annul or repeal all acts that may be subject to assessment of constitutionality, if they are not in accordance with the Constitution, laws, ratified international agreements and the basic principles of international law. Exercising this function, the Constitutional Court of Slovenia has the role of a negative legislator. For *Testen*, the aforementioned decisions have the so-called "constitutive effect", because they do not require any action by the legislature that would be directly determined by the Court's views on the particular issue[18]. The social relationship regulated by the repealed or annulled norm will be subject to re-regulation in a manner that is not contrary to the Constitution. On the other hand, in conditions when a decision on cassation is being made, there is a possibility for the Constitutional Court to act in accordance with Art. 40 paragraph 2 of the Law on the Constitutional Court and to act as a positive legislator. Namely, in conditions of cassation decisions, it is possible for the legal gaps that will appear with the cassation of the provisions, which inevitably require re-legislative action, to be regulated by the Constitutional Court itself. Thus, the Constitutional Court can determine not only the authority that should execute the decision, but also the *manner* in which it should do so[19]. The fact that the legislator left room to regulate the manner in which the decision of the Constitutional Court should be executed, in practice proved to be an instrument for the court to leave the sphere of its action as a negative legislator. The question of to what extent the legislator will be bound by the decision of the

[16]*The Binding Force of the Decisions of the Constitutional Court of Slovenia.*Testen Franc. Seminar on „ The effects of the Constitutional Court decisions". European Commission for Democracy Through Law. Strasbourg.2003.
[17]See Article 161 of the Constitution of Republic of Slovenia
[18]*The Binding Force of the Decisions of the Constitutional Court of Slovenia.*Testen Franc. Seminar on „ The effects of the Constitutional Court decisions". European Commission for Democracy Through Law. Strasbourg.2003.p 3
[19]Article 40 paragraph 2 of the Law on Constitutional Court

Constitutional Court arises as a consequential question in theory. Can we expect the once-repealed or annulled provisions to be re-adopted in line with *the abandonment of the concept of a ban on re-adoption of the legal norms subjected to cassation* specific to the German experience, or can the legislature be completely subordinated to the will of judges(which raises the question of counter-majoritarian difficulty) specific to the Austrian experience? The Constitutional Court of Slovenia has not faced such a problem, but in theory, the views on this issue are divided.

ii. Decisions establishing unconstitutionality of acts - this type of decisions of the Court raises the issue of the relationship of the constitutional court with the legislative authority. Namely, in accordance with Art. 48 of the Law on the Constitutional Court "if the Constitutional Court determines that a certain law, regulation or other general legal act is unconstitutional or illegal or if it does not regulate a certain issue in the manner in which it should be done, it may issue a declaratory decision, i.e. a decision establishing unconstitutionality".[20]The aforementioned legal solution is motivated by the need to oblige the court on the instruments of self-restraint from acting in the area of the legislative authority, because this type of decisions imposes a need for the legislator to deviate the unconstitutional norms from the legal system in a certain period of time. This type of decisions are another indicator of the impact the decisions on control of constitutionality have. However, both theory and practice has raised the question of the extent to which the legislator is bound by court decisions, especially given the experience that frequently the legislature has not acted to remove unconstitutional or illegal norms from the legal system. On the other hand, the solution from the legal provision, which envisages making this type of decision when the court considers that "the unconstitutional provisions do not regulate a certain issue in the way it should be done" is very interesting. This requestions the true implementation of the court's self-restraint doctrine, as the initial intention of the legislator, especially having in mind that the Court was again given a possibility to appear as a norm maker, i.e. possibility to prejudge how certain social relations should be regulated. Experience and statistics show that this type of decisions are often made on an annual basis, but that the National Assembly does not oppose to the Court regarding them.[21]

iii. Decisions on the interpretation of the law in accordance with the Constitution – these decisions are a recidivism of the solutions provided by the normative framework of 1963, and the basic intention of their retention in the new system of constitutional and judicial review of constitutionality is to restrict the Court from entering the area of action of the legislator. Namely, the main objective is in the procedure of an abstract or concrete control of the constitutionality of the legal acts, the presumption of the constitutionality of the legal act subjected to control, to be the starting point in the procedure before the Court. Slovenia's system of control of constitutionality does not accept the resolution the Court to act as an official interpreter of the constitutional provisions, but links this role to the specific procedures for control of the constitutionality that are initiated before it. These decisions are often found on the thin line of what constitutes the creation of new constitutional rules, through the interpretation of

[20]Article 48 of the Law on Constitutional Court

[21]Namely, in 1996, 1998 and 2001, 10 such decisions were made, and the National Assembly did not act in a timely manner in only 1 case. In 1999, out of 14 such decisions, the Assembly did not undertook any actions onlyon 1, while in 2000, out of 9 such decisions of the Court, there was no inaction of the National Assembly, i.e. the legislature acted on all of them in a timely manner. See tabular presentation*The Binding Force of the Decisions of the Constitutional Court of Slovenia.*Testen Franc. Seminar on "The effects of the Constitutional Court decisions". European Commission for Democracy Through Law. Strasbourg.2003.p 4,5

constitutional provisions and, as originally conceived, the self-restraint principle whose purpose should be achieved with the above-mentioned solution. Experience shows a proportion in the accusations of the court for the implementation of judicial activism, with the frequency of making such decisions or decisions establishing unconstitutionality. Namely, it seems that instead of realizing the initial intention of the legislator in adopting this type of decisions with the legal text, the polarization of the relations between him and the Court is not only unavoidable, but is encouraged by their adoption. The constitutional theory establishes that this imposes the need to find new solutions and instruments.

IV. CONCLUSION

European constitutional courts do not cause "tectonic" shifts in the system of social values. These are not courts that pass the so-called "fateful" decisions, like the "guardian of constitutionality" in the United States. However, constitutional courts are symbol of the materialization of the idea of control of constitutionality and a guarantee of human freedoms and rights. In comparative constitutional law, the constitutional court is assessed as the supreme interpreter of the constitution, conditio sine qua non for proper functioning of the constitutional order, an institution that collaborates with other state bodies and institutions and a successful guardian of the constitution. It is a construction without which the "brave new world" cannot be imagined. Compared to the actions of the US Supreme Court, which constitutional theory often considers to be the actions of an "angry bull", the constitutional courts are discreet, modest institutions acting with a careful and strategic avoidance of confrontation with other bodies in the system, making reasoned and bold decisions that possess the quality with inexplicable subtlety to start a completely new phase in constitutional development.

Today it seems that the European constitutional courts apply their own magic formula of decision-making. They skillfully balance the fine line between courageous decision-making that enables the protection of human rights and the principle of constitutionality on the one hand, and the avoidance of deviation from the principle of separation of powers, through instruments interpreted as judicial activism.

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