

The Justice Reform And Some Implications On The Constitutional Court

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“There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.” – Alexander Hamilton²

1. Abstract

The Justice Reform consists in one of the main steps necessary for the consolidation of the independence and accountability of the judicial branch of power. It has also been asked for a long time as the only tool for the return of the trust of people in the judiciary, in particular, and in the whole state organs in general. Finally, it's the most important homework towards the European integration. It has always been emphasized that, without a professional and independent justice system, Albania cannot stand shoulder to shoulder with other western developed democracies.

The Constitutional Court is one of the most important institutions in a democratic state governed by the rule of law. It's the guardian of the Constitution and has the mission of making its final interpretation through adjudication of constitutional disputes. In this regard, its role is very crucial in safeguarding the

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² Hamilton, Alexander, Madison, James, Jay, John, “*The Federalist Papers*”, no. 78.

human rights and fundamental freedoms. As such, preserving its impartiality and independence is one of the most important goals for the implementation of the rule of law. From the beginning of the democratic regime in Albania, the Constitutional Court has shown itself as one of the strongest defenders of the democratic institutions, the human rights and fundamental freedoms, separation of powers and the rule of law. Even though, it has always suffered political attacks and accusations of bias in its activity.

Having a professional and independent justice system is the half way in the consolidation of the rule of law and the realization of the greatest dream of this century for Albania, the European integration. Without a strong Constitutional Court the democratic process and the implementation of all necessary reforms is in danger. So, the reassessment of the focal procedural and substantial points on the organization and functioning of the Constitutional Court was made important in order to have a successful and effective justice reform. The past experience and the best models that can be found throughout the most consolidated democracies have given a significant backup in this area.

***Key words:** Justice Reform; Constitutional Court; rule of law; human rights and fundamental freedoms; judicial branch; separation of powers;*

2. The unconstitutionality of the constitutional amendments

As is well known, almost all constitutions have a similar structural construction. They consist of the preamble and the normative part. The latter further consists of the basic principles and fundamental human rights and freedoms as well as the institutional part. The first is considered as a super constitution, or as the part that represents the natural law in the constitution, while the second, as an expression of positive law, exists in function of the first. So, the organization and functioning of state institutions is always done in the service of realization of fundamental state-building principles and with the aim of protecting and promoting fundamental human rights and freedoms.

Consequently, the constitution is not an equivalent system of values. Some of these values enshrined in the constitution have a universal echo and are common values of civilized nations. It is these that constitute the essence of the constitution, or what is known from the doctrine as the super constitution. Principles such as the rule of law, the welfare state, democracy, parliamentarism, the separation of powers, and the protection of life, dignity, personality, and the entire corpus of fundamental rights and freedoms, constitute an invariable part of the constitution, sculpted in its preamble. This extraordinary importance is also given to them by

the fact that they are not merely national but have an international character, based on the values of humanity.

Adherence to fundamental principles and the protection of fundamental human rights and freedoms would remain an illusion if the constitution were sufficient to proclaim them and did not provide the means to guarantee them. For this purpose, constitutional justice has been established. Through the mechanism of reviewing the constitutionality of acts issued by state bodies, it is possible to guarantee the values of the constitution.

Constitutional justice can, according to the chosen model, be entrusted to the highest body of the judiciary (the Supreme Court) or a specialized body such as the Constitutional Court. The Constitutional Court is the reflection of the principle of constitutionality, expressed in the hierarchy of acts. The hierarchy of acts or sources of law means that a norm or source of law derives its validity from a higher source than it and the constitution which is the fundamental source, from the will of the people, which is the source of sovereignty.

However, there are some values that stand above any will, be it the will of the sovereign. Some values are considered universal and those that are born together with man, being an integral part of his existence. They cannot be violated but only defined, protected and promoted by positive law, including the constitution.

The real purpose of the Bill of Rights in the constitution is to exclude certain issues from the conflict of political debate, to place them beyond the will of the majority and officials, and to sanction them as legal principles applicable by the courts. The right to life, liberty and property, the right to speech, the press, the right to trust and organization, and other fundamental rights may not be subject to voting, they may not depend on the results of elections.³

At the same time, a system of government cannot survive on law alone. A political system must also possess legitimacy and, in our political culture, this requires an interaction between the principle of the rule of law and that of democracy. The system must be able to reflect the aspirations of the people. But there is more to it than that. The requirement of our legal order for legitimacy also relies on an appeal to moral values, many of which are sanctioned in the content of the constitution. It would be a great mistake if legitimacy were to be equated only with “sovereign will” or “majority principle”, excluding other constitutional values.⁴

In this context, constitutional justice in general and the constitutional court in particular, should not be conceived as defenders of constitutionality only in the formal sense. It has been a relatively easy task for the constitutional courts throughout their history to identify and repeal laws and other acts of an unconstitutional nature. This is because such a task fully complies with the

³ Judgment of the Supreme Court of the United States of America *W. Va. Bd. of Educ. v. Barnette*, 319 U.S.A. 624, 638, 1943.

⁴ Judgment of the Supreme Court of Canada Non-charter case of the secession of Quebec, 1998.

prima facie mission for which the constitutional court was established. However, constitutionality is more than just protecting the constitution from the norms that violate it.

The Constitution is the supreme law in the scheme of the sources of law. This statement is clearly affirmed in the Article 4(2) of the Albanian Constitution. As the reflection of the will of the people, it has the scope to limit the state power and to promote the human rights and fundamental freedoms of this people. In this aspect, the Constitution serves as the act by which the validity of the other acts is checked.

The legal order, in particular the legal order whose personification is the state, is not a system of norms which are coordinated with each other, which stand, say, next to each other, at the same level, but is the hierarchy of norms in different degrees. The relationship between the norm that regulates the creation of the other norm and that other norm can be assumed as a relationship between the giver and the receiver, which represents a linguistic figure in space.⁵

Naturally, after this affirmation, a question may be raised: can the validity of the Constitution, of its articles or of its amendments be evaluated? And who has the power to do so? Is that the Constitutional Court? These questions may have several answers, depending on the constitutional philosophy of one country or another.

There is disagreement in comparative constitutional law, primarily in the United States, regarding the justification for judicial review of the constitutionality of a statute. For the purpose of this paper, I assume that, in a given legal system, the constitution (expressly or impliedly) recognizes judicial review of statutes that violate the provisions of the constitution. The question I wish to deal with is whether that judicial review also covers an amendment to the constitution that has been made pursuant to the provisions of the constitution regarding amendment of the constitution. It seems that there is no need for great persuasion in order to show that even those who support judicial review of the constitutionality of a (regular) statute do not necessarily have to recognize the existence of judicial review of the constitutionality of a constitutional amendment. This problem arises both in legal systems whose constitutions include provisions that have been expressly determined to be unamendable (eternal clauses) and in legal systems in which there are no express “eternal clauses”.⁶

One of the external restrictions that can be placed on the Constitutional Court is the revision of the constitution that is made to invalidate its decision. But in some constitutions there are clauses of inviolability, i.e. the provision that the constitution itself has excluded from any kind of review. For example, in France

⁵ Kelsen, Hans, “*General theory of law and state*”, University of Prishtina, Prishtina, 2017, page 165.

⁶ Barak, Aharon, “*Unconstitutional constitutional amendments*”, *Israel Law Review*, Vol. 44/321, page 321 – 322.



and Italy the provision that the republican form of government cannot be revised or the provisions of some other constitutions that do not allow the revision of the provisions providing for basic human rights are precisely such clauses.⁷

The issue becomes even more delicate if we keep in mind that inviolable principles are not only what the constitution explicitly provides, but also some others that the court considers to be such because of the capital importance they have. This position has been clearly expressed by the Italian Constitutional Court in a decision of its own, with the following words: *“It cannot be denied that this court is competent to express itself on the compatibility of the laws of constitutional review even from the point of view of the highest principles of the constitutional order. In addition, if it were not so, we would fall into the absurdity of considering the system of judicial guarantees of the Constitution as deficient and ineffective, precisely in relation to those norms, which have the highest value”*.⁸

With law no. 7561, dated 29.04.1992, some changes and additions were made in law no. 7491, dated 29.04.1991, *“On the main constitutional provisions”*, a law which aimed to regulate, inter alia, the organization and functioning of the Constitutional Court of Albania. This law provided for the jurisdiction of the Constitutional Court, a constitutional body whose existence was determined for the first time in the Albanian legal order, inspired by the best models of Western democracies, the subjects that set it in motion, etc. Article 24 of this law determined exactly the circle of cases that this court was considering.

From the content of this provision as well as from the content of this law in general, it results that the Constitutional Court was not recognized the right to review the constitutionality of constitutional amendments. However, inspired by the doctrine as well as the jurisprudence of some constitutional courts of Western countries, the Constitutional Court of the Republic of Albania turns out to have exercised this power only once during its existence. With its judgment no. 57, dated 05.12.1997, the Constitutional Court decided to ascertain the constitutional invalidity of Article 2 of Law no. 8257, dated 19.11.1997, *“On a supplement to the Law no. 7561, dated 29.04.1992”*. In this decision, among other things, it says: *“... the decisions of the Constitutional Court are not subject to any control and that they are binding on all state bodies, not excluding the legislature. Even when acting as a constituent body, the legislator has no right to revise a constitutional provision (in the form of improving or supplementing this provision) to repeal the interpretative decisions of the Constitutional Court taken in support (in their interpretation) of the previous norms in power. This would run counter to our own constitutional law”*.⁹

With law no. 8417, dated 21.10.1998, was approved the Constitution of the Republic of Albania. In its eighth part, it defines the main principles of the

⁷ Traja, Kristaq, *“Constitutional justice”*, Publishing House “Luarasi”, Tirana, 2000, page 140.

⁸ Judgment no. 1146/1998, of the Constitutional Court of Italy.

⁹ Judgment no. 57, dated 05.12.1997, of the Constitutional Court of the Republic of Albania.

organization and functioning of the Constitutional Court, its jurisdiction, the subjects that set it in motion, etc. Similar to law no. 7561, dated 29.04.1992, the Constitution does not explicitly define the fact whether or not the Constitutional Court has the right to examine the constitutionality of constitutional amendments, leaving the debate immediately open.

The jurisdiction of the Constitutional Court is mainly limited to controlling the compliance of laws, international agreements before ratification and normative acts of central and local bodies with the Constitution, not directly specifying the position to be taken against constitutional laws or laws amending the Constitution. The special place of constitutional laws in the legal system and their supreme power, compared to ordinary laws, must be determined by the Constitution. Constitutional laws cannot and should not be contrary to the spirit of the Constitution, just as ordinary laws should not themselves be contrary to the Constitution and the constitutional laws.¹⁰

Such a debate ended with the amendments made to the Constitution of the Republic of Albania by law no. 76/2016, dated 22.7.2016, part of the justice reform package. In the Article 131, point 2, according to the amendment made to it by the aforementioned law, the Constitution provides that: “*The Constitutional Court, in the case when it is set in motion to review a law on the revision of the Constitution, approved by the Assembly under Article 177, controls only the observance of the procedure provided by the Constitution*”. The only exception to this is the Article 152 of the Constitution, which provides for the Constitutional Court the power to review also the substance of the constitutionality of the issues raised for referendum. Such issues cannot be those mentioned by Article 151/2 of the Constitution.

The exercise of the power of constitutional justice by the constitutional court, in a full and comprehensive sense, includes the protection of the constitution in both its formal and substantive sense. In the substantive sense, as noted, the constitution includes the aspirations of the people and its values, fundamental principles and objectives of the future. It is these elements that constitute the natural right of every nation, which it sanctions in this document.

The fundamental law is a system of values that recognizes the protection of freedom and human dignity as the highest goal of the entire system of law, but still, the figure of its man is not that of the arbitrary individual, but that of the personality that lies in community and owes him in many ways.¹¹ As a result, and as noted, the constitution recognizes the hierarchy of values within itself. This leads to the logical conclusion that the constitutional court, through the provision of constitutional justice, aims, first and foremost, to protect these values even against constitutional changes.

¹⁰ Sadushi, Sokol, “*Developing Constitutional Justice*”, Toena Publications, Tirana, 2012, page 219.

¹¹ Judgment of the Constitutional Court of the Federal Republic of Germany, BVerfGE 12, 45 [51]; 28, 175 [189].



It is possible that the violation of these basic constitutional values is done precisely by amending the constitution. This cannot leave the constitutional court in a passive role, as its mission lies beyond the formal protection of the constitution, but aims at its real protection, guaranteeing above all the spirit of the constitution. In such a case, the constitutional court cannot be prevented from reviewing the constitutionality of a constitutional amendment. Such a process is known as super constitutionality.

The constitutional courts of countries with a more developed constitutional justice than our country have already recognized and elaborated such a doctrine. Suffice it to mention the Constitutional Court of the Federal Republic of Germany and the Constitutional Court of the Republic of Italy. In a decision, the Constitutional Court of the Federal Republic of Germany stated: *“The Basic Law has set up a system of values, which limits state power. This system ensures the independence, accountability and dignity of man towards the integrity of state bodies. The highest principles of this value system are protected by the amendments to the Constitution. Violations of the Constitution are unacceptable, as the constitutional review exercised by the Federal Constitutional Court oversees compliance with the obligation of the legislature to comply with the provisions of the Constitution. Laws are not only “constitutional” when they are formally enacted. From a material point of view, they must be in harmony with the highest fundamental values of the liberal democratic order, as an order of constitutional values, and must also comply with the unwritten basic constitutional principles and basic ideas of the Constitution, and specifically with the principle of the rule of law and the welfare state. First of all, it is not allowed for laws to violate human dignity, which is considered the highest value in the Basic Law, but also, laws are not allowed to restrict the freedom of thought, the political and economic one to that extent as to touch its essence. It follows that every citizen is protected by a sphere of organization of his private life by the Constitution. So there is one last space where the freedom of the individual is inviolable and detached from the influence of all state power. A law that would violate this sphere can never be an integral part of the “constitutional order.” He must be declared invalid by the Constitutional Court”*.¹²

3. Question for a preliminary ruling from the courts

The jurisdiction of the Constitutional Court has been amended from the Law on Constitutional Provisions to the present Constitution. What remains always interesting about the Constitutional Court is its relationship with the courts. Courts are one of the subjects that have characteristics in relation to other subjects. They,

¹² Judgment of the Constitutional Court of the Federal Republic of Germany BVerfGE 2, 1 [12 p.]; 5, 85 [204 p.].

on the one hand, are included in the group of subjects which make a request without being related to their interests, but on the other hand this request must be motivated by resolving the case before that court, i.e. in the sense that the trial before such court cannot continue without the prior judgment of the Constitutional Court. This form of initiating constitutional judgment is known as incidental adjudication.

In addition to the abstract control of laws, which is often recognized as a direct review in the legal literature, in the texts of constitutions, and in the practice of constitutional justice recently as a trend of the time, concrete judgment is also known, or otherwise called indirect judgment, or incidental adjudication.¹³

This control, at its core, has the concept that combines the principle of control of the constitutionality of the law, according to the American system, where this right is exercised by every judge of the ordinary justice system, that of the European system, where as we have said above, this “monopoly” is exercised by a specialized body for this purpose, i.e. only the Constitutional Court.¹⁴

It is called incidental because it depends on the fact that the issue of constitutionality is raised as an incidental or side issue within the main process or trial, because it happens in an unusual way, but exceptionally due to its nature and purpose intended to control its compliance of a law with the Constitution, for which the Constitutional Court must rule.¹⁵

With law no. 7561, dated 29.4.1992, “*On some changes and additions to the law no. 7491, dated 29.4.1991*”, in addition to the creation for the first time of the Constitutional Court, as a body charged with the protection of constitutionality and legality, was also sanctioned its jurisdiction and the subjects that set it in motion. Article 8/2 of this constitutional law provided that when during the examination of the case, the ordinary courts conclude that the normative act did not comply with the law “On the main constitutional provisions” and with the laws, they suspended the trial and sent the case materials to the Constitutional Court. Under these conditions, incidental adjudication was envisaged as a means of communication between the ordinary courts and the Constitutional Court, which aimed not only to guarantee the constitutionality of laws but also the constitutionality and legality of other normative acts (normative acts issued by the Council of Ministers and Ministers).

With law no. 8417, dated 21.10.1998, the Constitution of the Republic of Albania was approved, which repealed law no. 7491, dated 29.4.1991, “*On the main constitutional provisions*”, as amended. Of course, constitutional justice would be one of the most important aspects of the new constitution and would be the main focus of the parliamentary debate at the stage of preparatory work (travaux préparatoires).

¹³ Abdiu, Fehmi, “*About the incidental adjudication*”, The Advocacy Magazine, no. 18.

¹⁴ Traja, Kristaq, “*Constitutional justice*”, Publishing House “Luarasi”, Tirana, 2000, page 58.

¹⁵ Sadushi, Sokol, “*Constitutional control*”, Publishing House “Botimpex”, Tirana, March 2004, page 108.



With the approval of the Constitution of the Republic of Albania in 1998 the institute of incidental adjudication was preserved but with a change. Judges can now invest the constitutional jurisdiction only for the compliance of the law with the Constitution. Regarding the control of the constitutionality and legality of normative bylaws, the new Constitution has transferred this power to the judges themselves. Not only the different linguistic formulation of the second paragraph of Article 145 of the Constitution in relation to Article 8/2 of Law no. 7561, dated 29.4.1992, leads to such a conclusion, but also the content of the first paragraph of this provision of the Constitution (Article 145) installs the power of judges to control the constitutionality and legality of normative bylaws. According to Article 145/1 of the Constitution, judges are subject only to the Constitution and laws and, consequently, have the authority to reject any other act of public power that does not conform to these higher acts.

The Constitutional Court for the first time in its jurisprudence, in the judgment no. 2, dated 3.2.2010, held that when *“the judge during a trial, concludes that the law and sub-legal act, which are directly related to the resolution of the case, contradict each other, he is obliged to is based on law”*. This is the meaning of Article 145 of the Constitution, according to which *“judges are subject to the Constitution and laws, respecting the hierarchy of sources of law, as an obligation deriving from the principle of the rule of law”*.¹⁶

With the adoption and entry into force of the Law 49/2912 *“On the administrative courts and the adjudication of administrative disputes”*, the institute of incidental adjudication, which as a natural power of any judge of the republic derives from Article 145/1 of the Constitution, was expressly sanctioned in Article 38 of this law. Already every administrative judge, but not only, during the main trial of an administrative action, mainly or at the request of the parties, decides not to apply a normative bylaw, on the basis of which the administrative action under review is performed, when he considers that the normative bylaw is illegal.

In the same way, by analogy, it will be acted when the normative bylaw is unconstitutional, always if the law itself, based on the implementation of which this act was issued, is not unconstitutional. In this second situation, that is, when the law itself is unconstitutional, the court must suspend the trial and apply to the Constitutional Court with a request to repeal the law in question. If the law, in these circumstances, were to be repealed, then even the normative bylaws, based on and for its implementation, would be repealed, as they cannot have an independent existence.

This situation very clear for judges of all levels, looks like has been disturbed by the provision of Article 49/3, letter “dh”, of the organic law of the Constitutional Court (law no. 8577, dated 10.2.2000), according to the change that this provision has suffered by law no. 99/2016, dated 6.10.2016. This provision, in contrast to the clarity

¹⁶ Judgment no. 2, dated 3.2.2010, of the Constitutional Court of the Republic of Albania.

of Article 145/2 of the Constitution, the way in which the incidental adjudication has been understood since 1998 (when the Constitution was adopted) and the content of Article 68 of the very organic law of the Constitutional Court, provides that incidental adjudication will to be exercised by the ordinary courts not only when the law is in conflict with the constitution but also when such an unconstitutionality is ascertained in a normative bylaw which finds application in the case at trial.

I think that such a solution not only contradicts the provision that Article 145/2 of the Constitution has always been, but it is not in line with other legal provisions. The power conferred on judges by Article 145/1 of the Constitution and subsequently affirmed by Article 38 of the Law on Administrative Courts cannot be overturned by a provision which resembles an alien object in the body of our legislative corps. The unconstitutionality of the normative bylaw, being inseparable from illegality, will be cured through an incidental adjudication by the ordinary judge, i.e. by directly applying the law, if the latter meets the standards of constitutionality. In these circumstances, this provision will have to be left unenforceable by the judges.¹⁷

4. Legislative omission

In European constitutional doctrine and jurisprudence, a distinction is made between the term legislative omission (*lacuna legis*) and the term legal vacuum.¹⁸ Avoiding the gap created by the lack of a legal norm, both through the legislative process and through the implementation of the law by analogy, is considered a matter of legislative omission. The legal vacuum is an even more extreme situation, when the gap created in a certain area of relations can only be avoided by enacting laws. In both cases, however, the court is not prohibited from filling the legal gap by interpreting the law, resolving the case on the basis of the general principles of law and the application of analogy. Fulfilment of this function by the Constitutional Court does not avoid its confusion with the power of the “positive legislator”. The analysis of the concept of legislative omission by the doctrine and constitutional jurisprudence is related both to the obligation of the legislative institutions, to issue those legal norms, which are ordered by the Constitution, as well as to the evidence of non-implementation of these obligations. Legislative omission is identified both in cases where the law has not regulated a certain relationship, which in fact had to be regulated (absolute omission), and when the law has failed to meet the full and proper manner of this obligation (relative omission).¹⁹

¹⁷ Pëllumbi, Engert, “*Judicial control over the normative bylaw*”, The Advocacy Magazine, no. 32.

¹⁸ “*Problems of legislative omission in constitutional jurisprudence*”, General Report of the XIV Congress of the Conference of European Constitutional Courts, Vilnius 2008.

¹⁹ Sadushi, Sokol, “*Developing Constitutional Justice*”, Toena Publications, Tirana, 2012, page 235 – 236.



One of the issues that fall within the jurisdiction of the Constitutional Court is the review of the unconstitutionality of the norm as a result of legislative omission. The jurisdiction of the constitutional courts includes the declaration of the unconstitutionality of the partial (relative) omission, as well as the ascertainment of the unconstitutionality of the inaction of the legislative subjects (absolute omission).²⁰

The Constitutional Court of the Republic of Albania in its practice has recognized cases of repeal of certain provisions as a result of evasion of their meaning, due to legislative omission. One of these cases was the abrogation as unconstitutional of article 1 of law no. 9260, dated 15.07.2004 “*On some additions and changes to the law no. 7748, dated 29.07.1993*”, as amended.

In this judgment it states that: “*it is not clarified whether Article 1 of the new law guarantees a new type of compensation, is part or complementary of the previous compensation, or if it is essentially a kind of supplementary assistance on realized income by prisoners and political persecuted ... Article 1 does not stipulate for how long the first heirs of former political prisoners included in category “A” will benefit from the right to financial compensation ... For political prisoners who have died in prisons, it is not specified whether they will be compensated for the entire sentence, or only for the actual time of serving the sentence until the moment of death ... It is not clear the ratio legis, i.e. the purpose of drafting this article and his relationship with the previous Article 9 of the same law, which it changes. It is not clear whether Article 9 of the previous law was considered insufficient, unenforceable, fully or partially enforced. ... in its content there are a number of inaccuracies and ambiguities, the clarification of which is more than necessary for its proper understanding and application in practice*”²¹

However, in its practice, the Constitutional Court of the Republic of Albania has recognized only the mechanical abrogation of the norm, i.e. the removal of the legal force of a certain law or its provisions as a consequence of the fact that it contradicts the Constitution, as the law with the highest legal power in the country. But again, our Constitutional Court has never explicitly ruled out the possibility of intellectual repeal of the norm, which means declaring the unconstitutionality of the part of the norm that the legislature should have foreseen but failed to do.

The Constitutional Court, in its judgment no. 4, dated 23.02.2016, with the claimant the District Court of Vlora, with object: *Repeal as incompatible with the Constitution of the Republic of Albania of Article 169 of the Civil Code in the part that does not recognize the subjective right of the former owner to be compensated for loss of property with the equivalence of its value*, as well as in its judgment no. 43, dated 12.07.2016, the claimant the District Court of Vlora, with object: *Repeal*

²⁰ Sadushi, Sokol, “*Developing Constitutional Justice*”, Toena Publications, Tirana, 2012, page 239.

²¹ Judgment no. 34, dated 20.12.2005, of the Constitutional Court of the Republic of Albania.

as incompatible with the Constitution of Article 209 of the Code of Civil Procedure, in the part that does not recognize the right of special appeal against the interim court decision, which rejects the request for imposing a security measure on the lawsuit, turns out to have been expressed in principle in relation to the claim of the referring court for the unconstitutionality of the respective norms, as a consequence of the legislative omission. Thus, it has not a priori ruled out the control of the constitutionality of the legislative omission of a provision of law and has not rejected the claims based on this argument.

Most constitutions of European states do not explicitly provide for the right of the constitutional court to observe the constitutionality of legislative omissions or the procedure for their consideration. The only constitution that provides for the omission as part of the constitutional court's jurisdiction, in order to identify the constitutionality of legal acts due to inaction, is that of Portugal.²²

The jurisprudence of the Italian Constitutional Court distinguishes between absolute legal emptiness as a result of inaction and relative legal emptiness known as "partial inaction of the legislature". This Court may not only repeal a norm that is inconsistent with the Constitution, but may interpret this norm in such a way that it appears to be in conformity with the Constitution. When the Italian Constitutional Court finds that the scope of a legal norm is contrary to the Constitution, because the relevant legal regulation has not been drafted (the so-called "partial inaction of the legislature"), it does not focus on the missing legal norm, but the general principles that should be reflected in the content of the norm.²³

The position of the Constitutional Council of France is different, due to the special function related to the preliminary control of laws. This body of constitutional justice implements the mechanism of preventing legal loopholes, establishing the "negative incompetence" of the legislator, which is related to his inability to exercise full competence.²⁴

In this regard, the experience of the Constitutional Courts of European countries, which have accepted this form of constitutional control, which has elaborated the technique of controlling the constitutionality of the norm as a result of legislative omission, is quite valuable. The issue of legislative omission in the practice of these Constitutional Courts has been resolved in various forms, for example, by imposing obligations on the legislature to fill the legal gap that creates unconstitutionality, leaving a deadline for this purpose, and pushing for the entry into force of its decision; forcing or permitting ordinary courts to make a conciliatory interpretation of the norm, in order to avoid the unconstitutionality it

²² Sadushi, Sokol, "Developing Constitutional Justice", Toena Publications, Tirana, 2012, page 237.

²³ Sadushi, Sokol, "Developing Constitutional Justice", Toena Publications, Tirana, 2012, page 237.

²⁴ "Problems of legislative omission in constitutional jurisprudence", General Report of the XIV Congress of the Conference of European Constitutional Courts, Vilnius 2008.



brings, by making a conciliatory interpretation with the constitution of the norm, without declaring its unconstitutionality or declaring the unconstitutionality of the omitted part of the norm.²⁵

What is important to note, even from the recent jurisprudential developments of the Constitutional Courts in Europe, is that the latter have departed from the classical framework of the negative legislature and through the technique of constitutional control of legislative omission have become fillers of legislative gaps which have unconstitutional consequences.

Such a check of the constitutionality of the norm has been done, for example, even in cases of unequal treatment of citizens. *“If the legislature privileges certain groups by violating Article 3 of the Constitution, then the Federal Constitutional Court may either declare the privileged norm invalid, or find that non-consideration of particular groups is unconstitutional. But support or privilege should not be given to exclude groups unless it is known with certainty that the legislature would have taken such a measure.”*²⁶

With the changes that have been made to law no. 8577, dated 10.02.2000, *“On the organization and functioning of the Constitutional Court of the Republic of Albania”*, through law no. 99/2016, dated , for the first time, the manner of handling the legal gap (legislative omission) is foreseen. Article 76, point 5, of this law provides that: *“5. When the Constitutional Court, while examining a case, finds that there is a legal gap, as a result of which there have been negative consequences for the fundamental rights and freedoms of the individual, it, among other things, imposes the obligation of the legislator to complete the legal framework within a fixed term”*.

Although this constitutes the genesis of legal treatment of problems that arise as a result of legislative omission, such a provision is considered incomplete and insufficient to resolve all situations that may arise in practice as a result of this flaw in the law. It should be the jurisprudence of the Constitutional Court which, this first step taken towards the treatment of the phenomenon of legislative omission, has to elaborate and develop to the same standards as that of the constitutional courts of other European countries that accept it and provide appropriate solutions.

5. Conclusions

For the preservation of democracy in general by actors and negative phenomena, it is very important to guarantee and ensure the democratic content of the country's constitution. In this case, in theory, the question arises: is it right, and if so, to

²⁵ *“Problems of legislative omission in constitutional jurisprudence”*, General Report of the XIV Congress of the Conference of European Constitutional Courts, Vilnius 2008.

²⁶ Judgment of the First Senate of the Constitutional Court of the Federal Republic of Germany, dated 11 June 1958.

what extent can constitutional changes be initiated and made by a majority that is practically in power for a given term.²⁷

For this purpose, there exist the Constitutional Court, i.e. to prevent the excess of the limits of power by institutions of a political nature as well as to prevent the endangering of the very foundations of democracy and the rule of law. This danger may come not only from a simple majority, through the adoption of unconstitutional laws but, above all, from super majority which may change the Constitution itself.

Consequently, in this European framework of jurisprudential development as well as in this political climate in which Albania floats, would be quite necessary not the denial but the affirmation of the right of the Constitutional Court to examine the constitutionality of constitutional amendments. Removal of such a prerogative by law no. 76/2016, dated 22.7.2016, which amended the Constitution of the Republic of Albania, constitutes a denaturation of its role as a guarantor of the Constitution and is a step backwards in the history of Albanian constitutional justice. On the other hand, such an action goes in the opposite direction to the developments of European constitutional justice.

It is concluded that in the recent decisions, the Constitutional Court has rejected and almost inclined not to legitimize the courts. It should be noted that judges are considered legal experts. As such, it is them, more than any other entity, which must identify the constitutional issues that exist in legislation. Given that the Constitutional Court has not shown a positive will towards being open with the courts, thus paving the way for a thorough review of incidental adjudications even in cases where only suspicions are raised about the unconstitutionality of a norm or even when the referring court does not has given sufficient arguments for this unconstitutionality, then it remains for such a thing to be done by law, being reflected in its organic law.

The mission of the Constitutional Court differs from that of ordinary courts. The latter resolve the case only on the basis of claims and objections of the parties as well as the evidence served by them, while the Constitutional Court has the duty to guarantee the constitution and such a mission cannot be related to the adequacy of the arguments brought by the referring court. Guaranteeing the Constitution takes on a primary and independent importance from the conviction or suspicion of a referring court or the level of arguments brought by it. The repeal of laws that violate the Constitution remains an obligation for the implementation of the rule of law, as one of the tasks that the Albanian people have set for themselves beginning from the preamble of the Constitution.

Legislative omission is a concept elaborated by both the doctrine and foreign jurisprudence. At the heart of this concept is the failure of the legislature to regulate

²⁷ Zaganjori, Xhezair, “*Democracy and the rule of law*”, Publishing House “Luarasi”, Tirana, 2002, page 63.



those legal relations defined by the Constitution, which is the law with the highest legal force in the country. This failure can appear in two forms: total failure, which occurs in those cases when the legislator has not fulfilled at all his obligation to regulate the legal relationship imposed by the Constitution (absolute omission) or in non-full implementation and due obligation of the legislature through the law (relative omission).

The consequence of legislative omission is the abolition of the norm. This abrogation can be complete, which consists in a mechanical abrogation of it, in those cases when the omission is such that it makes the norm in question incurable, but it can also appear in the context of an intellectual abrogation, being declared by the Constitutional Court the unconstitutionality of the part that should have been provided by the provision but which failed to do so. Intellectual abolition of the norm is a well-known practice and well accepted by the constitutional courts of European countries.²⁸ The problems of the new millennium, the challenges of constitutional justice and the need to revitalize the “*living law*” in our legal order, as well as the European perspective of the Republic of Albania, require the Constitutional Court to accept in its jurisprudence the theory of intellectual abrogation of the law.

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²⁸ Judgment no. 250, dated 28.11.1986; Judgment no. 317, dated 06.07.1989; Judgment no. 207, dated 18.07.2009, of the Constitutional Court of Italy.

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