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# *Types of decisions of the Albanian Constitutional Court and their legal effects*

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CONTENT: Abstract; 1. Introduction; 2. Classification of Constitutional Court decisions; 3. Decisions on non-examination of cases on the merits; 4. Final decisions; 5. Announcement and entry into force of decisions; 6. Legal effects of Constitutional Court decisions; 7. Conclusions; Bibliography.

## 1. Introduction

The Constitution has not defined the types of decisions of the Constitutional Court. It has been limited only to the provision that decisions of the Constitutional Court are final and have general binding force[1], what implies that at the end of each court examination, Constitutional Court issues a decision. This constitutional provision determines at the same time the way of functioning of constitutional justice, which profoundly affects the effectiveness of Constitutional Charter and, in particular, of the rights set forth thereof. This means that

*Opinions expressed in this paper are of the author and do not represent the standpoints of the institution where she performs her duty.

[1] Article 132, paragraph 1 of the Constitution of the Republic of Albania.

the guardian of the Constitution has the last word and there is no room for doubt on the "seal" of constitutionality[2].

Typology of Constitutional Court decisions has been set out in the law no.8577/2000 "On the organization and functioning of the Constitutional Court of the Republic of Albania" (law no.8577/2000), which has been subject to modifications[3] after the constitutional amendments of the justice reform in 2016[4]. These changes are also reflected in the way how Constitutional Court exercises its decision-making activity.

However, the constitutional jurisprudence has had and still has a decisive role in defying and classifying the Constitutional Court decisions, which, based on the best practices of the homologue courts, as well as through the reasoning followed during specific procedures under its review, has identified new types of decisions that have not been provided by the organic law of the Constitutional Court.

## 2. Classification of Constitutional Court decisions

From a procedural point of view, decisions of the Constitutional Court, as well as those of courts of ordinary jurisdiction, are divided into interlocutory decisions, non-final decisions and decisions on the merits. Whereas, from the point of view of merits of the case, Constitutional

[2] V. BALA (PAJO), *Rrugëtim kushtetues*, Artic, Tirana, 2018, 123.

[3] In the framework of justice reform, the organic law of the Constitutional Court no. 8577/2000 was amended by the law no. 99/2016.

[4] Constitution has been amended by the law no.76/2016 "*On some amendments and additions to the law no. 8417, dated 01.10.1998, "Constitution of the Republic of Albania", amended.*

Court decisions are classified into two categories: decisions on non-examination of cases on the merits and decisions on the merits. In distinction to the various terms of constitutional decision-making recognized by the international case law[5], Albanian Constitution and law no.8577/2000 recognize only the word "decision" as the only term that identifies the legal act of constitutional adjudication[6].

The category of decisions on non-examination of cases on the merits includes decisions on duly completion of the application, decisions on joining the applications, decisions on suspension, decisions on clarification and completion of decision, decisions on the case dismissal and decisions not to transfer the cases for judgment to the plenary session. Decisions on the merits are otherwise named as 'final decisions'[7] and this term is related to the general binding force that the Constitutional Court decisions have over all the constitutional bodies, public authorities, including the courts[8]. After the constitutional amendments of 2016, this category includes decisions on rejection or admissibility of the application,

[5] For the form of Italian Constitutional Court decisions see A. RUGGIERI, A. SPADARO, *Lineamenti di Giustizia Costituzionale*, Giappichelli, 2019, 165 ss.

[6] S. SADUSHI,*Drejtësia Kushtetuese në zhvillim*, Toena, Tirana, 2020, 376.

[7] According to article 132 of the Constitution, these decisions are called final. If compared to judicial proceedings held at the courts of ordinary jurisdiction, the term "final" for these kind of adjudications is used in the sense of decision that closes judicial process. Whereas, in context of constitutional provision and constitutional case law, the term "final" in relation to the Constitutional Court decisions indicates the general binding force that they have and is given only to those decisions that review the merits of the case.

[8] Decisions no.21, dated 29.04.2010; no. 14, dated 03.06.2009 and no. 5, dated 07.02.2001 of the Constitutional Court of the Republic of Albania.

in part or completely[9]. These types of decisions have substantial differences between them, and this takes special importance in cases where the object of constitutional review are the normative acts.

Decisions on admissibility of the application are those by which the Constitutional Court considers as grounded the issue of constitutionality of the act under review and decides its abrogation. They have *"erga omnes"* effects.

On the contrary, decisions on rejection of the application are those by which the Constitutional Court considers as ungrounded the issue of constitutionality of the act under review. These decisions do not give the latter a "patent" of constitutionality. They have only "*inter partes*" effects and the applicant may be re-addressed to the Constitutional Court[10] if he/she submits a new argument or reason for the unconstitutionality of the normative act[11].

[9] Before the entering into force of the last amendments, (law no.99/2016), article 74 of the organic law of the Constitutional Court provided for another type of decision-making – refusal of the application.

[10] See decisions no.7, dated 23.02.2021; no. 21, dated 29.04.2010;no. 29, dated 21.12.2006 of the Constitutional Court of the Republic of Albania. the Court has held that: On the other hand, the Court has accepted in its practice the re-examination of application with the same object, in cases when through another application, within the time frame provided by its organic law, it has been argued a new ground for the unconstitutionality of normative acts. Whereas, in cases when the Court has previously ruled on the merits of allegations raised by parties, in the situation of resubmission of the application, it has held that the previous decision constitutes an obstacle from the constitutional point of view, as long as a final position has been taken for the same issues raised again in the new application.

[11] Exceptionally, according to the new provision of article 71/c, points 3 and 4 of the law no.8577/2000, if the Constitutional Court has previously ruled on a case, which has been adjudicated by an international court and the latter has concluded that the individual's fundamental human rights and freedoms have been violated as a result of the Constitutional Court decision, the subjects infringed upon, in whose favor the

However, analysis of the constitutional case law shows that this traditional categorization in the way of decision-making of the Constitutional Court, for various reasons, has not always been followed by the latter. It has elaborated increasingly sophisticated and complex decision-making techniques, developing in this way the orientation that unconstitutionality is a consequence of the "bankruptcy" of interpretation of normative act in conformity with the Constitution, and that constitutional jurisdiction has the function of "interpreting re-composition" or "normative integration" of the legal system[12].

As for the structure of decisions they contain the introduction, the descriptive-reasoning part and the ordering part[13].

### 3. Decisions on non-examination of cases on the merits

The main category of decisions of the Constitutional Court that do not examine the merits of the case includes the decisions not to transfer the cases for examination to the plenary session. The latter are taken during

international court has ruled, shall be entitled to address the Constitutional Court with a request to reopen the judicial process. The request to reopen the judicial process before the Constitutional Court should be filed within 4 months of the entering into force of the international court decision. It should contain a summary of the international court decision, highlights of findings and the concrete research made by that court. The applicant should explicitly request the reopening of judicial process and the abrogation of act.

[12] G. ZAGREBELSKY, V. MARCENO', *Giustizia costituzionale*, Il Mulino, Bologna, 2012, 338-339.

[13] These elements are not to be found in constitutional or legal provisions, but they have been addressed and consolidated by the Constitutional Court in its case-law. In analogy to decisions of the courts of ordinary jurisdiction, see article 310 of Civil Procedure Code.

the phase of preliminary review of the applications submitted to the Constitutional Court, either by the chambers[14] (unanimously) or by the Meeting of Judges[15] (by majority of votes). In any case, where the application does not meet the criteria set out in the new Article 31/a, paragraph 2 of the law no.8577/2000[16], it is decided not to pass the case over to the plenary hearing.

In addition to the above, article 31, paragraph 2 of law no.8577/2000 stipulates that when the application is not duly completed[17], the chamber

[14] The preliminary examination of the application is done by a chamber composed of three judges, including the rapporteur (article 31, paragraph 1 of the law no.8577/2000).

[15] When one of the judges of the chamber is not of the same opinion with the others, the application shall be passed over for preliminary examination to the Meeting of Judges (article 31, paragraph 3 of the law no.8577/2000).

[16] Article 31/a, paragraph 2 of the law no.8577/2000 states:

2. The decision not to transfer a case to the plenary session shall be taken when:

a) the searches contained in the application do not fall under the powers of the Constitutional Court;

b) the application has not been filed by the legitimate person;

c) the application has been filed by an unauthorized person;

ç) it is established that the application has been filed beyond the legal time limits;

d) the applicant has not exhausted the effective legal remedies prior to approaching the Constitutional Court, or the legislation in force provides for available effective remedies;

dh) the searches contained in the application are subject of a previous decision of the Constitutional Court or the reinstatement of the infringed right is no longer possible;

e) the application is manifestly ungrounded.

[17] The content of the application submitted to the Constitutional Court is provided by the article 27 of the Law no.8577/2000. According to the paragraph 2 of this article, the application shall be submitted in a written form in Albanian language, in clear and understandable language, in as many copies as the number of participants in trial and it shall include:

a) The name and address of the Constitutional Court; b) The name, surname or denomination, residence or domicile of the applicant and/or representative; c) The name, surname or denomination, residence or domicile of interested subjects and/or their representatives; ç) The subject-matter of the applicant and the legal basis; d) submission of causes and alleged violations of a constitutional nature; dh) documents, evidence or other exhibits associating the application; e) certified copies of all the decisions which are

may send it back to the applicant for completion, indicating the reasons for the return and the deadline for its completion. Although the law does not specify the way in which the chamber should rule on the matter, from the Constitutional Court case law it might be observed that even in these cases, the chamber has taken decisions on completion of the application[18]. Also, during the review of applications filed with the Court by the ordinary judges (the incidental review)[19], when the Constitutional Court finds that the application is not duly completed and not in accordance with the legal criteria, it returns the file to the court that has sent it. As already mentioned, even in this case, the chamber has ruled by taking a decision on the matter[20].

In cases when the Constitutional Court, *ex officio* or upon the request of the party, orders the suspension of respective law or legal act[21], as the case may be, the Court rules by a decision which is taken either by the Meeting of Judges or at the plenary session. In analogy to decisions on suspension taken during the ordinary adjudication, even the Constitutional Court, at

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the subject matter of the application, as well as complaints and recourses submitted to other judicial instances; ë) signature of the applicant or his/her representative, as well as the act of representation of the latter.

[18] See decisions no.22, dated 19.12.2019 and no.16, dated 17.01.2020 on the completion of the application, given by the Chambers of the Constitutional Court of Albania.

[19] According to the article 145, paragraph 2 of the Constitution and article 68 of the Law no.8577/2000, when judges find that laws come into conflict with the Constitution, they do not apply it. In this case, they suspend the proceedings and send the case to the Constitutional Court.

[20] However, it does not appear that there have been such cases in the Court's case law.

[21] Pursuant to article 45 of the Law no. 8577/2000, this happens when the Constitutional Court considers that the implementation of the law or legal act may consequently affect the state, social or individual interests.

any stage of the constitutional review, or by decision of the plenary session, may withdraw the measure of suspension and be expressed at the final decision on the continuation or not of this measure.

The changes brought about by the justice reform package in 2016 included in the catalog of decisions on non-examination of cases on the merits even the decisions on suspension, where during the constitutional review, Constitutional Court decides to request an advisory opinion from the European Court of Human Rights (ECtHR), regarding the implementation of the rights and freedoms provided by the European Convention on Human Rights and its additional protocols, or an *amicus curia* opinion from other organizations[22].

In this case, the hearing is reopened immediately after receiving the advisory opinion from the European Court of Human Rights or the *amicus curia* brief.

Article 80, paragraph 1of the law no. 8577/2000 has also provided for the competence of the Constitutional Court to accurate and complete its decision. Thus, the Constitutional Court shall be entitled, upon request, to correct errors in writing, in computation or any obvious inaccuracy allowed in the decision, without changing the substance of the decision, within two months of its announcement[23]. The examination of request for accuracy and completion of the Constitutional Court decisions, although the merits of the case are not to be discussed, is done in the plenary

[22] See article 44/b of Law no.8577/2000 (added by Law no. 99/2016).

[23] See decision no. 24 dated 29.05.2013 of Constitutional Court of the Republic of Albania.

session. Before the amendments of 2016 became effective, the previous wording of the same article provided even for the possibility to interpret the court decisions where there were room for doubts or disagreements about its meaning, but in any case without changing the content[24].

The category of decisions on non-examination of cases on the merits includes also the decisions on dismissal of the constitutional adjudication. These kind of decisions have been foreseen by law no.8577/2000 in two cases. Firstly, when the applicant waives the application before the Constitutional Court commences examining it (article 31/b) or, at any stage of the process, until the decision of the Constitutional Court (article 43/b, point 2), and, secondly, when a law or normative act, or parts thereof, that are subject to review before the Constitutional Court, are abrogated or amended before the latter makes the decision (article 51, point 2 of the law)[25].

## 4. Final decisions

When there are no procedural reasons that may constitute an obstacle for examination of application on the merits, i.e. by satisfying the "screening process", that determines the non-passing of case for examination to the plenary session, the Court examines the merits of the application

[24] See decision no.23, dated 23.04.2012 of Constitutional Court of the Republic of Albania.

[25] In both cases, the Constitutional Court may decide to continue the examination of the case when it considers that the issue is of public or State interest.

submitted by the subjects that can put it into motion[26]. In these cases, the application filed with the Constitutional Court is examined in the plenary session and its decision-making is regulated according to specific procedures, provided by the law no.8577/2000[27].

The binominal of how the adjudication before the Constitutional Court may end is either the declaration of legal provisions as unconstitutional, or the declaration of the application as ungrounded. *Tertium non datur*. Nevertheless, the Court in its jurisprudence has reiterated that it is necessary to overcome this rigid scheme. The former President of the Italian Constitutional Court, Giuseppe Branca, has stated in this regard that Constitutional Court acts more to preserve the law than to abrogate it; tends to abrogate it in part rather than overthrow it all, and this is not just to *favor legitimatis*, but because it would be like stepping out of your attributes to seize what has been given to the legislative, if a certain legislative act that may stand in whole or in part is radically abolished[28].

[26] The entities that may address the Constitutional Court are provided in article 134 of Constitution.

[27] Special procedures are provided for in Chapter VII of Law no.8577/2000.

[28] C. LEONE, *Il principio di continuità dell'azione amministrativa,* Giuffré, 2007, 329. According to the author, such theses can be disagreed arguing that, since the Parliament and the Constitutional Court do not act in different and opposing areas, there is no room for *horror vacui*: if the Court considers that the norm extracted by the legal provision is not in conformity with the Constitution and, consequently, removes it from the legal order, then the Parliament should fill in the gap and replace the provision declared as unconstitutional with another one coming in line with the Constitution, so that the system of norms be complete and coherent.

Therefore, based on the way how the constitutional adjudication ends, or the reasoning techniques employed by the Constitutional Court, decisions on the merits are of different natures.

### 4.1. Decisions on interpretation of the Constitution

The authority of the Constitutional Court to make the final interpretation of the Constitution derives directly from article 124, point 1 of the Constitution[29]. After the constitutional amendments of 2016[30], the wording of this article connects this authority of the Constitutional Court with *"settling of the constitutional disputes*", what actually constitutes its function[31], meanwhile the concrete cases of "*constitutional disputes*" are detailed in article 131 thereof[32].

[29] Article 124, point 1 of Constitution provides that "*The Constitutional Court settles constitutional disputes and makes the final interpretation of the Constitution*".
[30] Constitution of the Republic of Albania has been modified by the law no.76/2016.
[31] Article 2 of Law no.8577/2000 has the same content as article 124 of the Constitution and is entitled "Functioning of the Constitutional Court".
[32] Article 131 of the Constitution has provided that:
1. The Constitutional Court decides on:
a) compatibility of the law with the Constitution or with international agreements as provided for in Article 122;
b) compatibility of international agreements with the Constitution, prior to their ratification;
c) compatibility of normative acts of the central and local bodies with the Constitution and international agreements;
ç) conflicts of competencies between powers, as well as between central government and local government;
d) constitutionality of the parties and other political organizations, as well as their activity, according to Article 9 of this Constitution;

Through this technique it is possible to turn the Constitution into "a living" instrument" that adapts to the developments of values in the legal order, guaranteeing that new values, which were probably not in the attention of the drafters of the Constitution, receives dignity, recognition and, above all, constitutional protection[33].

The legal doctrine has elaborated the meaning of article 124 of the Constitution in different ways. A part of it has treated this competence of the Constitutional Court as independent of its other competences provided by article 131 of the Constitution, considering that interpretation is a method and all the possible issues arising from the Constitution for constitutional verification fall under its scope; while another part of the

dh) dismissal from duty of the President of the Republic and verification of his inability to exercise his functions;
e) the issues bearing a connection to the electability and compliance in assuming the functions of the President of the Republic, MPs, functionaries of bodies foreseen in the Constitution, as well as to the verification of their election."
ë) constitutionality of the referendum and verification of its results;
f) final examination of the complaints of individuals against the acts of the public power or judicial acts impairing the fundamental rights and freedoms guaranteed by the Constitution, after all effective legal means for the protection of those rights have been exhausted, unless provided otherwise by the Constitution.
2. The Constitutional Court shall, when recourse being sought for examining a law on the revision of the Constitution approved by the Assembly according to Article 177, control only the compliance with the procedural requirements foreseen in the Constitution.

[33] Decision no. 20, dated 01.06.2011 of the Constitutional Court of the Republic of Albania. Application of this interpretation technique by the Constitutional Court has generated a lot of objections especially from the ordinary judges, as it may happen that reconciling interpretation of the challenged norm by the Constitutional Court be not in line with that made by the ordinary judge, or quite the opposite (see F. PAPAJORGJI, B. BARA,*Roli i Gjykatës Kushtetuese dhe i gjyqtarëve të zakonshëm në interpretimin pajtues*, Journal Jeta Juridike, Number 3, 2019, 63 ss).

doctrine has assessed it as a method of controlling only the issues provided in article 131 of the Constitution[34].

The approach of the Constitutional Court on its function to make the final interpretation of the Constitution has not always been constant[35]. On the one hand, in its jurisprudence the Court has made the final interpretation of article 77, paragraph 2 of the Constitution regarding the establishment of investigative commissions by the Assembly[36], as well as of article 125, paragraph 3 of the Constitution[37], regarding the renewal of one-third of the constitutional judges[38], even though these issues have not been explicitly provided by article 131 of the Constitution. On the other hand, when the object of review has been the interpretation of articles 70, 71 and 72 of the Constitution, the Court rejected the application upholding that there was not a "concrete issue" that required interpretation[39].

In my opinion as the author of this paper, although *prima facie,* it seems as if the Court has not been consistent in its decision-making. It has not questioned the fact that interpretation is a method for all the possible

[34]K. TRAJA, introduction essay of *Drejtësia Kushtetuese në zhvillim*, S. SADUSHI, cited work, 23-24. The author argues that the Constitutional Court has more authorities than just those provided in Article 131 of the Constitution, which, according to him, is not exhaustive with regard to the jurisdiction of the Constitutional Court.

[35] S. SADUSHI,*Drejtësia Kushtetuese në zhvillim*, cited work, 206-209.

[36] See decision no.18, dated 14.05.2003 of the Constitutional Court of the Republic of Albania.

[37] Before the constitutional amendments of 2016, the rule of renewing one-third of constitutional judges every three years was provided for in Article 125, paragraph 3 of the Constitution. Currently, this rule is provided by paragraph 6 of the same article.

[38] See decision no. 24, dated 09.06.2011 of the Constitutional Court of the Republic of Albania.

[39] See decision no. 29, dated 30.06.2011 of the Constitutional Court of the Republic of Albania.

issues that require constitutional review or verification, but, since 2011[40], it has addressed this competence as related with the existence of a *"constitutional problem/dispute"*, whose solution it intends to find, because otherwise it would be placed in the role of the organ that gives advisory opinions on the way how constitutional institutions should act in the future[41].

In any case, until there is a clear and consolidated position of the Constitutional Court on this matter, particularly after the constitutional amendments[42], it remains to be hopeful that it will not give up one of the instruments that guarantee the fundamental principles of the rule of law

[40] Until decision no.24, dated 09.06.2011 of the Constitutional Court of the Republic of Albania, the latter did not connect the final interpretation of the Constitution with the existence of a constitutional dispute. It was sufficient that the issue was raised by entities who justified their interest to initiate the constitutional review. (See also decisions no.37, dated 23.06.2000, no. 38, dated 23.06.2000, no. 39, dated 23.06.2000, no .49, dated 31.07.2000 of the Constitutional Court of the Republic of Albania).

[41] See decision no. 24, dated 09.06.2011 of Constitutional Court of the Republic of Albania. In this decision the Court stated that "*its interpretative competence, within the meaning of Article 124 of the Constitution, does not imply the formulation of entirely abstract interpretations of the constitutional norm, as this would place the Court in the role of a body that gives advisory opinions on how constitutional institutions should act in the future. If the Court would render interpretative decisions in abstracto, without saying the final word on the constitutionality of the act resulting from the exercise of the respective activity of the subject, this decision would take the characteristics of the preliminary constitutional review*".

[42] It should also be noted here that since December 2020 the composition of the Constitutional Court is entirely new (despite the rule of renewal every three years of one third of constitutional judges under Article 125, paragraph 6 of the Constitution), because the Constitutional Court, as any other court of ordinary jurisdiction, was subject to the rigorous process of transitional re-evaluation, so-called the vetting process, which rendered it ineffective (Law no .84/2016 *"On the transitional re-evaluation of judges and prosecutors in the Republic of Albania").* For the time being, Constitutional Court is composed of 7 judges, out of 9 that is the total number of judges.

and democratic society, as well as human rights and freedoms provided by the Constitution.

### 4.2. Decision on admissibility of the application

When the Court considers that one or several constitutional norms, or parts thereof, are not in conformity with the Constitution, it decides on the admissibility of the application under review. In any case, Constitutional Court in the ordering part of its decision states the effects of decision and its consequences[43]. When the Court declares the unconstitutionality of a legal norm or of an act with legal force, it loses its power as of the day of publication in the Official Gazette. The effects of such decisions are valid for the future (*ex nunc*)[44].

In case of incidental control, the loss of effects of the abrogated norm is understood as the non-enforcement of the norm; non-enforcement not only by the judge *a quo* (before whom the case is heard), but also by the other judges (when the issue of constitutionality has been raised, the judges who are adjudicating matters related to the law in question, as a general rule, suspend the adjudicating process until the decision of the

[43] Article 51/a, paragraph 1, letter "ç" of the law no.8577/2000.

[44] Exceptionally, article 76, paragraph 7 of the law no.8577/2000 provides for the cases when decision has retroactive effect.
Specifically, the decision shall have retroactive effect only against:
a) a criminal sentence, even while it is being executed, if it is directly connected with the implementation of the law or normative act that has been repealed;
b) cases being examined by courts, as far as their decisions are not final and irrevocable.
c) unexhausted consequences of the law or normative act that has been repealed.

Constitutional Court)[45]; non-enforcement not only by the judges, but also by the other persons (private or public subjects), who should apply this norm.

But, decisions on admissibility of the application are also addressed to the lawmaker, which upon entering into force of the Constitutional Court decision, should take the necessary measures to regulate the legislation. In this context, Constitutional Court in its case law has upheld that, in those cases where it considers that as a consequence of an abrogating decision a legal gap is created, which in itself constitutes unconstitutionality, it has reasoned and reflected it as part of the decision, giving the necessary time to the lawmaker to fulfill the norm, or a part of it, in accordance with the Constitutional Court decision, deciding also to postpone its entry into force for this purpose[46].

[45] In distinction to the Italian law no. 87/1953 that in its article 25, paragraph 1 stipulates that as soon as the decision, by which the judicial authority has initiated a constitutional adjudication, is filed with the Constitutional Court, the President of the (Italian) Constitutional Court disposes the publication in the Official Gazette, the law no. 8577/2000 regulating the organization and functioning of the Constitutional Court of Albania has no provision in this regard. Nevertheless, in practice, in order to achieve the same goal, Constitutional Court of Albania has always published on its official website the cases when the application for incidental control has been transferred for examination to the plenary session, so that everyone, and especially the other judges, be aware of the fact that a certain norm is subject to constitutional review. See decisions no. 4, dated 15.02.2021, no.11, dated 09.03.2021, no.20, dated 20.04.2021 of Constitutional Court of the Republic of Albania.

[46] See decisions no. 4, dated 15.02.2021, no. 11, dated 09.03.2021, no .20, dated 20.04.2021 of Constitutional Court of the Republic of Albania. In its decision no.11, dated 03.09.2021, Constitutional Court of Albania had the opportunity to express its position regarding the measures taken by the public authorities to deal with the COVID-19 pandemic situation (prohibition of gathering of more than 10 people). It emphasized that the Court's role is not to evaluate whether these measures are technically adequate and appropriate, but to analyze the importance of protecting the public health, within the

There have also been cases when the Court has decided to abrogate only one word of the provision under review considering it as unnecessary, because even without it the norm could have been understandable and applicable[47], thus without requesting the further intervention of the lawmaker.

As per above, taking into consideration all the subjects affected by the judgment held before the Constitutional Court, the effects of decisions on the admissibility of application are *erga omnes* and their power is the abrogation of norms declared as unconstitutional[48].

### 4.3. Decisions on rejection of the application.

If the Constitutional Court considers that the norm does not present any problems of constitutionality regarding the allegations raised in the application[49], it decides to reject the application. When the Constitutional

framework of the legitimate goal which justifies the restrictions to constitutional rights and freedoms in a pandemic situation. In this decision, the Court concluded that expression "*until a second order*" found in the content of the act imposing the restriction, does not meet the standard of proportionality that restrictions should have, arguing that the competent body should review the duration of the imposed restrictions within a week from the announcement of its decision.

[47] See decision no.15, dated 17.04.2003 of the Constitutional Court of the Republic of Albania.

[48] Unlike decisions of the Italian Constitutional Court which invalidate the norms considered as unconstitutional, (see P. CARETTI, U. DE SIERVO, *Istituzioni di diritto pubblico,* Giappichelli, Torino, 2010, 407), decisions of the Constitutional Court of Albania on admissibility of the application have the power to abrogate the norm.

[49] According to article 48 of law no. 8577/2000, the terms of reviewing the case are within the subject of the application and the grounds provided in it, and, exceptionally, when

Court concludes the constitutional adjudication with a rejecting decision, it is not affirmatively expressed about the constitutionality of the challenged legal norm, although according to some doctrinal opinions the terminology of the article 131, point 1, letter "c" of the Constitution[50] implies the opposite[51].

As previously mentioned, the issue of compatibility with the Constitution of the same act of public power can be raised again before the Court, but only if the applicant presents new reasons of unconstitutionality. However, in my opinion as the author of this paper, this is not the only possibility that the Constitutional Court has to reexamine the constitutionality of the normative provision. The evolution (*in meius*) of the previous constitutional case law, or of the social values adapted to the development of our democratic society, may be considered as other cases that might require *ex novo* intervention from the constitutional justice[52].

there is a link between the object of the application and the other normative acts, the Constitutional Court may decide to review these latter as well.

[50] Article 131 of Constitution provides: c) compatibility of normative acts of the central and local bodies with the Constitution and international agreements.

[51] K. TRAJA, introduction essay of *Drejtësia Kushtetuese në zhvillim*, in S. SADUSHI, cited work, 34-35.

[52] See decision no. 30, dated 17.06.2010 of Constitutional Court of the Republic of Albania. In this case, the Court changed its jurisprudence to harmonize it with the case-law of the European Court of Human Rights. The Court reinterpreted its practice regarding the trial in absentia employing the technique of conciliatory interpretation of the provisions of Criminal Procedure Code.

### 4.4. Decisions on the legal gap

According to the provision of article 76, paragraph 5 of law no.8577/2000, where during the examination of a case, the Constitutional Court finds out that there is a legal gap that has brought negative consequences to the fundamental rights and freedoms of individual, the Court, *inter alia*, imposes on the legislator the obligation to complete the legal framework within a certain time limit. This provision is one of the novelties of the constitutional amendments of 2016 and, in terms of wording, it is similar to the typology of "additive" decisions of the Italian Constitutional Court[53].

After the resumption of its activity in 2021[54], while reviewing the Law on property (Law no.133/2015), Constitutional Court stated the gap identified in this law[55], assessing that the lack of regulation by the law "*constitutes a legal gap that brings about negative consequences to the right of private property*".

In fact, even before this explicitly stated provision, the Court has had the opportunity to be expressed about legal gaps (as mentioned in point 4.2 above - Decisions on admissibility of the application) created as a result of abrogation of provision by the Court itself[56]. Therefore, it can be said

[53]P. CARETTI, U. DE SIERVO, *Istituzioni di diritto pubblico*, cited work, 411.
[54] See footnote no. 42.
[55] See decision no. 4, dated 15.02.2021 of Constitutional Court of the Republic of Albania.
[56] See decision no. 12, dated 14.04.2010 of Constitutional Court of the Republic of Albania.

that the content of law no.8577/2000 has been amended, but this has not affected the essence of decision-making process of the Court.

It should be emphasized that due to this decision-making technique, the Court has managed to introduce new rules into the legal system which are not found in the text of law. In these cases, the simple abrogation of law on unconstitutional grounds does not resolve the problem raised during the constitutional review and introducing of new/missing rules remains the only way to guarantee the constitutional principles that have been violated.

This type of decision seems to contradict the Kelsen's method of constitutional review, according to which the Constitutional Court should be a "negative legislator"[57], because through such decisions the Court transforms itself into a creator of legal norms, playing a role that in the parliamentary system mainly belongs to the Parliament. Although the Court has underlined that *"its duty is not to place itself in the role of a positive legislator by establishing legal regulations, but to verify whether the solution provided by the legislator is in conformity with the provisions of the Constitution*[58]*", de facto,* the Court, through its case law while reviewing the normative acts, as well as through its orientations given to the legislator regarding the necessity to fill the gap created after the abrogation of a certain provision or regarding

[57]H. KELSEN, "*La garantie juridictionnelle de la constitution (La Justice constitutionnelle)*", Revue du droit public et de la science politique en France et à l'étranger, Librairie Général de Droit et the Jurisprudence, Paris 1928, 197 ss.; A. S. SWEET, *Constitutional Courts*, Oxford Handbook of Comparative Constitutional Law, OUP, 2012, 4.

[58] See decision no. 12, dated 14.04.2010 of Constitutional Court of the Republic of Albania.

the principles to be applied during the legislative process, has reached a plausible stage of evolution, so that its active role in the lawmaking process cannot be denied.

### 4.5. Decision on reconciliatory interpretation

When reviewing the constitutionality of laws object of its examination, the Court has been generally guided by the presumption of their compatibility with the Constitution. This implies that convincing arguments should be presented with regard to the alleged unconstitutionality, in order to offer the Court the possibility to appraise whether the applied legal remedies violate the constitutional norms and values[59].

On the basis of this principle, in many cases the Court has considered as necessary to apply the technique of conciliatory interpretation of the challenged norm, where it has identified that the law or the legal norm could be interpreted in more than one way, one of which being in conformity with the Constitution. This method searches for the

[59] See decisions no. 16, dated 25.07.2008, no. 29, dated 31.05.2010, no. 5, dated 27.01.2017, no. 9, dated 01.03.2021 of the Constitutional Court of the Republic of Albania. The Court has also emphasized that the right of the lawmaker to regulate a situation that was differently regulated before should remain untouched, as one of the requirements of a constantly developing society, which cannot be understood without a dynamic normative framework that adapts to its development. The Court has stated that the Assembly, as a legislative body, has the right to implement or concretize specific policies for improving the governance and developing the country as a whole, as well as to respond to the country priorities or to the problems encountered. However, it should be reiterated that the laws or special provisions thereof, adopted by the legislator for this purpose, should not come in conflict with the provisions of the Constitution.

constitutional effects of different outcomes and selects the outcome that is in line with the constitutional values, taking into consideration the fundamental rights of the individuals. By using this conciliatory interpretation, the Court has reached the conclusion that the challenged law or norm is constitutional, provided that it be interpreted according to the way opted for in the reasoning part of its decision. Any other interpretation of provisions is not allowed from the constitutional point of view and protection of the acquired rights cannot be achieved if to the challenged norms is given a different meaning[60].

It is worth mentioning here that with this type of decision, although the Constitutional Court does not abrogate the concrete provision, however it intervenes in it, in order to restore its text within the boundaries of constitutionality i.e. to "save" it from the unconstitutionality.

Based on the jurisprudence of the Italian Constitutional Court (to which it has been explicitly referred in its decision-making), the Court has treated the concept of "living law" as one of the shortcomings of its interpretation technique, by generally understanding it in the sense of existence of a "consolidated", "constant jurisprudence" on a certain legal provision (given the way it "lives" in the concrete reality). The use of "living law" formula has helped the Court to establish relations with the ordinary judges in the field of interpretation of law (known as a task mainly belonging to the latter), taking a *self-restraint* position in this regard. The

[60] See decisions no.29, dated 31.05.2010, no. 2, dated 18.01.2017, no. 43, dated 10.04.2017 of Constitutional Court of the Republic of Albania.

Court takes the existence of this "living law" into consideration (with only few exemptions) and does not make a different interpretation, even where it appraises that a different way of interpretation would be more convincing[61]. The authority of the Court is limited before the constant jurisprudential interpretation because, even in its full adjudication autonomy, the Court cannot ignore an interpretation that gives to the legislative norm its effective value in the legal life, given that the norms are not actually those proposed in the abstract way, but those applied in the everyday activity of judges who try to make them concrete and efficient[62].

### 4.6. Decisions on findings and compensation

Although the decisions on findings and compensation have not been foreseen in the category of decisions taken by the Constitutional Court at the end of adjudication process, the latter has rendered such kind of decisions in its jurisprudence before the amendments of 2016, when analyzing the principle of trial within reasonable time[63].

Where the examination of cases was limited only to the finding of violation of a certain right, the Court has given decisions without any beneficial

[61] G. ZAGREBELSKY, V. MARCENO', cited work, 371-372.

[62] See decision no. 6, dated 17.02.2012 of the Constitutional Court of the Republic of Albania.

[63] In the light of ECtHR case-law, the principle of reasonable time has been analyzed both during the adjudicating process and enforcement of the final court decisions, although the constitutional case-law has been mainly focused on the enforcement issues.

effect for the applicant, as they did not provide for any ways to restore the violated right[64]. In this context, European Court of Human Right has observed that constitutional adjudication in itself turns out to be (or at least some times) a non-effective remedy, particularly with regard to non-enforcement of final court decisions and non-compliance with the principle of reasonable length of court proceedings[65]. The justice reform of 2016 brought some amendments to the Civil Procedure Code (CPC), which, in relation to violation of the principle of reasonable length of court proceedings, have provided for a specific remedy to be applied by the courts of ordinary jurisdiction. More concretely, applications for the just compensation of individuals who have suffered pecuniary or non-pecuniary damages due to the unreasonable length of the court proceedings, which have to do not only with the finding of violation or the speeding up of procedures, but also with the damage compensation (article 399/1 – 399/12 of the CPC). Even though a step forward as compared to the previous discipline, this remedy selected by the lawmaker has its own limitations. In fact, the lawmaker could have chosen to provide the Constitutional Court, according to the model of ECtHR, with the opportunity to compensate the damage[66], as an alternative to restore the violated right.

[64] See decisions no. 1, dated 21.01.2016, no. 6, dated 23.02.2016, no. 22, dated 20.03.2017 of the Constitutional Court of the Republic of Albania.
[65] See *Berhani v. Albania*, 27 May 2010, §§ 87- 91; *Gjonbocari and others v. Albania*, 23 October 2007, §§ 98-103, *Marini v. Albania,* 18 December 2007, §§ 180-191.
[66] The only case provided by law no.8577/2000 regarding compensation is the review of applications for unreasonable length of proceedings before the Constitutional Court itself (article 71/ç).

Under these circumstances, it could be imagined that the Constitutional Court, although deprived of this opportunity, can still take decisions on finding violation of rights, in form of the so-called "warning" decisions[67], which are not completely *inutiliter data* given that, at the very least, they have a discouraging effect over the public authorities for not committing in the future acts that do not respect the principle of the rule of law and fundamental human rights and freedoms[68].

### 4.7. Decisions on refusal of the application

According to the constitutional law before the constitutional amendments of 2016, where during the voting process the votes were equally divided, or in a way that none of the case conclusions could be voted by the required majority, the Constitutional Court decided to refuse the application. This refusal was not an obstacle for the applicant to re-submit the application if the necessary conditions were created to reach the required majority of votes[69], as it has already happened in the case law of

[67] See decision no. 40, dated 18.07.2012 of the Constitutional Court of the Republic of Albania. In this case, the Court has decided to examine the applicant's claim with the view to respect and protect the fundamental human rights and freedoms and to prevent their violation in the future, although the personal security measure the applicant was challenging was already ceased during the process of examination on the merits.
[68] F. PAPAJORGJI, V. TEOTONICO, *Reflections on individual constitutional complaint in Albania*, Evolution, Journal of life sciences and society, vol I, issue 1, July 2020, 17.
(see
https://unizkm.al/uploads/media/post/0001/02/fb0bcfd12648562ce60055060bd47f403d336a81.pdf)
[69] Article 74 of law no.8577/2000, abrogated by law no. 99/2016.

the Constitutional Court of Albania[70]. In the jurisprudence of this Court, there have been several cases of refusal of the application[71]. The refusal of the application has been one of the shortcomings found by the ECtHR with regard to the adjudication process held before the Constitutional Court of Albania. According to the ECtHR case law, the refusal of the application violates the requirements of article 6 of the European Convention on Human Rights (ECHR)[72]. Thus, the ECtHR has upheld that individuals who initiate legal proceedings before the courts must enjoy the fundamental guarantees provided for in Article 6. These guarantees comprise also the right to have final decision on cases addressed to the court, including the Constitutional Court. The failure of the Constitutional Court to achieve the required majority of votes needed for the cases under review, leaves the applicant without a final decision and, consequently, restricts the essence of his/her right to be heard by the court.

With regard to the legal provisions in other countries for cases where the judicial body does not manage to reach the required majority of votes for taking a decision " (...) in some countries the vote of the President of the Court prevails, in some other countries, this means the validity of the act

[70] See decisions no. 9, dated 07.02.2017; no. 4, dated 15.02.2021 of Constitutional Court of the Republic of Albania.

[71] See decisions no.16 dated 01.03.2017, no. 58 dated 04.08.2016 and no. 54 dated 27.07.2016 of Constitutional Court of the Republic of Albania.

[72] Article 6 of ECHR. Right to a fair trial.

1.In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

under review and, somewhere else, the decision is considered as having been taken until the required majority is reached"[73].

In this context, there are the constitutional and legal norms those that have imposed this type of solution. Therefore, in order to have a decision-making, which guarantees the fundamental rights and freedoms and is in accordance with the case law of ECtHR, the improvement of the law no.8577/2000 by the lawmaker remains a priority[74].

With the entry into force of the constitutional amendments of 2016, the law no.8577/2000 does not any longer foresee the provision of refusal of the application[75] and decision is considered as taken only when the required majority of votes is achieved. Where the majority of five judges is not achieved, the application shall be considered rejected[76].

## 5. Announcement and entry into force of decisions

In the decision-making process of the Constitutional Court, special importance is given to the announcement and entry into force of its decision. From these stages of decision-making process, only the entry into force finds constitutional regulation, as it has been foreseen by article

[73] K. TRAJA, *Drejtësia Kushtetuese*, Tirana, 2000, 98.
[74] See *Marini v. Albania*, 18 December 2007, § 124.
[75] The need to amend the law no. 8577/2000 has been elaborated in the legal doctrine by XH. ZAGANJORI, A. ANASTASI, E. (METHASANI) CANI, *Shteti i së drejtës në Kushtetutën e RSH*, Aldeprint, Tirana, 2011, 169 ss.
[76] See article 73, paragraph 4 of law no. 8577/2000.

132, paragraph 2 of the Constitution, while other aspects are regulated by the law no.8577/2000[77].

In particular for cases which have the review of constitutionality of laws or the dispute of competencies between the powers as their object, although not provided in the organic law or in the Internal Regulation, after the voting of its decision, the Constitutional Court publishes on its official website the ordering provisions/dispositive of decision immediately after its adoption[78]. In special cases dealing with matters of public importance, the Constitutional Court may announce ordering provisions immediately after the decision is made and announce the reasoned decision within five days. This is the only case provided in law no.8577/2000 for the notification of ordering provisions of decision[79].

The final decision shall be announced reasoned no later than 30 days from the end of the hearing session[80], unless otherwise provided for in this

[77] Some other aspects are regulated by the Internal Regulation "*On the constitutional adjudication and the functioning of Constitutional Court administratio*n". However, this regulation does not reflect the amendments made in law no.8577/2000, due to the lack of the necessary required quorum of constitutional judges for almost three years. The regulation is currently under a revision process.

[78] Authority to publish only the dispositive of the court decision belongs to the Meeting of Judges.

[79] See article 72, paragraph 6 of the law no. 8577/2000.

[80] Article 47, paragraph 3 of the law no. 8577/2000, amended. Before the judicial reform, after the voting process, the judge rapporteur had to prepare the draft of the final decision. The time limit for drafting the decision by the judge rapporteur was determined by the Meeting of Judges at the moment of voting the decision, which should respect the template adopted by the Meeting of Judges. Determination of this deadline came as a necessity, because the Constitutional Court has failed too many times to respect the reasonable time to announce its final decisions. The current practice of the Constitutional Court (although not for a long time ) has shown that the respect of the reasonable time has brought some problems, given that there is not always a coincidence between the ending day of the court hearing and the day of its decision-making. Moreover, in this

regard[81]. If during the examination of the case it has been decided for the suspension of law or legal act under review, the Constitutional Court should pronounce a final decision for the continuation or termination of the suspension[82]. After the draft-decision is prepared, it is discussed and adopted by judges. Decision is then subject to final editing under the supervision of the judge rapporteur[83]. Before being announced, the decision is signed by all the judges present at the hearing[84]. The decision is given "On behalf of the Republic of Albania"[85].

According to the provision of article 72, paragraph 4 of the organic law no.8577/2000, parties in the process are notified about the announcement of decision, but their absence does not hinder its announcement. After the announcement of decision, in addition to the copy handed to the parties involved, a copy is sent for being published in the Official Gazette[86]. Full decisions are published on the Court official website as well.

The judge expressing a dissenting opinion enjoys the right to reason his opinion and thus it is attached to and published together with the court decision[87].

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period of resumption of its activity, the Court had to cope with the entire backlog of cases accumulated during almost three years of its non-functioning (see footnote no. 42)

[81] See footnote no.79.

[82] Article 45, paragraph 4 of the law no. 8577/2000 provides:
The Constitutional Court should pronounce a final decision for the continuation or termination of the measure of suspension.

[83] See article 12 of the Internal Regulation.

[84] See article 72, paragraph 3 of the law no. 8577/2000.

[85] See article 72, paragraph 5 of the law no. 8577/2000.

[86] See article 26 of the law no. 8577/2000.

[87] See article 72, paragraph 8 of the Law no. 8577/2000.

As a general rule, Constitutional Court decisions enter into force on the date of their publication in the Official Gazette. However, the Constitutional Court may decide that the decision to repeal an act may produce effects on a date different from the date of its entry into force[88]. The final decisions of the Constitutional Court are published in the beginning of the coming year in a special edition prepared by the Department of Studies, Researches and Publications. This edition comes together with the respective index and statistics of the Court decision-making for the period in question[89].

## 6. Legal effects of Constitutional Court decisions

Constitutional Court decision produces legal effects since the moment of its entry into force. In addition to *erga omnes* or *inter partes* effects, as it has been previously mentioned, Constitutional Court decisions are final and have general binding force[90].

With regard to effects of these decisions, the constant jurisprudence has underlined that articles 124, 132 and 145, paragraph 2 of the Constitution have explicitly stated the binding force of Constitutional Court decisions over all the constitutional organs, public authorities and courts. Enforcement of Constitutional Court decisions is a constitutional

[88] See footnote no. 46.
[89] See article 13, paragraph 4 of Internal Regulation.
[90] See article 132, paragraph 1 of Constitution, and article 76, paragraph 1 of the law no. 8577/2000.

obligation. They constitute constitutional jurisprudence and as a result, they have the force of law[91]. No other organ, except the Court itself (and this is only related to the changing of the jurisprudence and revision of the Constitution), can refuse to enforce them. To leave the enforcement of constitutional decisions under the evaluation of other organs might create the dangerous precedent of denying to this organ its function as the guarantor of the Constitution. The role of the Constitutional Court lies precisely in the binding force of its decisions. The wording of the Constitution regarding the general binding force of Constitutional Court decisions determines the authority of this organ and is the only acceptable way for the fair and final resolution of issues of constitutional nature[92].

This binding effect is related to both the ordering and the reasoning part of decision. The reasoning used in the Constitutional Court decisions stems from its authority to say the final word on issues for which the others have already spoken. Respecting the doctrine and the constitutional jurisprudence, and based on the case law of Federal Constitutional Court of Germany[93], the Court has underlined that the binding effect extends to

[91] See decision no. 5, dated 07.02.2001 of the Constitutional Court of the Republic of Albania. In addition, see also K. TRAJA, introduction essay of *Drejtësia Kushtetuese në zhvillim*, S. SADUSHI, cited work, 53. The author states that it is obligatory to respect the Constitutional Court decisions. After all, the typology of this obligation is the same as that towards the legal norms: it has normative character, general binding force, state sanction, formal determinability and documentary form.

[92] See decisions no. 18, dated 30.03.2021, no. 49, dated 03.07.2017, no. 15, dated 01.03.2017, no. 44, dated 29.06.2015 of the Constitutional Court of the Republic of Albania.

[93] See decisions BVerfGE 1, § 14 and BVerfGE 20, § 56 of the German Federal Constitutional Court.

the crucial arguments of its decision, i.e. *ratio decidendi,* which elimination would render the decision, in its entirety, meaningless. The indisputable impact of Court decisions is such that it imposes over all the state organs, including here even the courts, the binding force of the reasoning of its decision.

## 7. Conclusions

On the one hand, the analysis of decision-making techniques of the Constitutional Court reiterates the idea that, while exercising its mission as a guarantor of the Constitution, i.e. of the principles of the rule of law and fundamental human rights and freedoms, it has been trying to maintain its constitutional jurisprudence, given that only in very rare cases it had to change it, in order to be adapted to the ECtHR and other homologue courts decisions. On the other hand, it shows that, during the years of its existence, the Constitutional Court has been able to be in line with the evolution of Albanian constitutional justice system. In the intellectual exercise of systematic-evolutionary constitutional interpretation, based on the ECtHR case law, the Court has updated the spirit and content of the Constitution, not only by improving the already established standards for the protection of constitutional rights and principles, but also by adapting them to the development of constitutional order values.

Furthermore, with the view to adapt its activity to the "living law", the Constitutional Court has employed the technique of conciliatory interpretation, as a more efficient and flexible instrument not only towards decisions on the abrogation of normative provisions, but also towards *ad hoc* interventions of the lawmaker.

Decision-making of the Constitutional Court has been faced sometimes with harsh criticism, because, as any other organ, it needed the necessary time to mature its experience. It is worth mentioning here the fact that due to its decision-making the Court has managed to increasingly create a climate of dialogue and cooperation with other powers, particularly with the lawmaker. This is quite often the case where it has to abrogate certain normative provisions and determines the respective actions to be taken by the lawmaker, or where it decides to postpone the entry into force of its decision in order to give to the lawmaker the necessary time to fill in the legal gap created after its decision-making.

In spite of the indisputable progress, especially during the last decade, there is much more to be done with regard to the decision-making of the Constitutional Court, paying special attention to the cases where Albania has been sanctioned by ECtHR, which are related to its decision-making. In this context, no matter how innovative and courageous they might be, Constitutional Court decisions cannot be enough, as long as the intervention of the lawmaker is needed, because the Court can do lot of things but not everything!

What can we wish for is that the Court does not give up the instruments that guarantee the fundamental principles of the rule of law and

democratic society, as well as human rights and freedoms provided by the Constitution.

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