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Original Scientific Paper
UDC: 342(497.7)
doi: https://doi.org/10.56461/SPZ_1174
Received: 3. 6. 2026.
Accepted: 13. 7. 2026.
Online First: 15. 7. 2026.

CONSTITUTIONAL JUDICIAL ACTIVISM IN NORTH MACEDONIA

Summary

The sui generis character of constitutional adjudication in the Republic of North Macedonia derives from the fact that, in Europe, there appears to be no other Constitutional Court whose jurisdiction, organisation, procedures and functioning are regulated exclusively by the Constitution and in its own internal act, without the support of a separate statutory framework. This constitutional peculiarity creates scope for two distinct approaches. The first would be for the Court to adhere to a formalistic interpretation and preserve the existing status quo. Such an approach would undoubtedly provide a comfortable and convenient position for both the Court and other state institutions, including the Assembly, the Government and other public authorities. However, it would contribute little, if anything, to the advancement of the rule of law. The second approach would require the Court to move beyond formalism and demonstrate judicial activism. Such an approach inevitably gives rise to tensions, and at times conflicts, with other state authorities, as well as to pressures and influences of varying nature and intensity, predominantly of a political character. Nevertheless, this approach plays a significantly role in shaping constitutional, legal and political culture and constitutes a substantial contribution to the development of a democratic state founded on the rule of law. This paper examines the concrete consequences arising from the adoption of either of these two approaches.

Keywords: Departure from Formalism, Judicial Activism, Juristocracy, Living Constitutionalism, Formal and Substantive Constitutionality, Conflict of Laws.

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USTAVNOSUDSKI AKTIVIZAM U SEVERNOJ MAKEDONIJI

Sažetak

Sui generis karakter ustavnosudskog odlučivanja u Republici Severnoj Makedoniji proizilazi iz činjenice da u Evropi verovatno ne postoji drugi ustavni sud čija su nadležnost, organizacija, način rada i funkcionisanje utemeljeni direktno u Ustavu i sopstvenom poslovniku, bez posebnog zakonskog okvira. Ova ustavna specifičnost suštinski otvara prostor za dva moguća pristupa. Prvi je da se Sud prepusti formalizmu i zadrži *status quo*, što bi nesumnjivo rezultiralo komfornom i lagodnom pozicijom za sam Sud, kao i za Skupštinu, Vladu i druge državne organe; međutim, takav pristup ni na koji način ne bi doprineo razvoju vladavine prava. Drugi pristup jeste da Sud odstupi od formalizma i pokaže sudski aktivizam. Međutim, ovaj pristup neizbežno stvara tenzije, pa čak i konflikte sa drugim državnim organima, kao i pritiske i uticaje različite prirode i intenziteta, pretežno političke. Ipak, ovaj pristup značajno oblikuje ustavnu, pravnu, pa čak i političku kulturu, i nesumnjivo predstavlja ozbiljan doprinos izgradnji demokratske države zasnovane na vladavini prava. Ovaj rad posvećen je konkretnim rezultatima koji proističu iz izbora između jednog od ova dva pristupa.

Ključne reči: odstupanje od formalizma, sudski aktivizam, juristokratija, živi ustavni kontinuitet, formalna naspram materijalne ustavnosti, sukob zakona.

1. Introduction

"The Constitution is not a museum exhibit, but a document that must live and breathe together with the people." In contemporary conditions, the role of constitutional courts has expanded beyond the traditional understanding associated with Kelsen's model of the 'negative legislator'. The defensive function of constitutional courts, namely the protection of the Constitution, is no longer the sole, nor necessarily the most significant, function performed by such courts. Alongside this role, some constitutional courts, by departing from strict formalism, have assumed a more active position in shaping, designing and structuring the legal order as a whole. When this reality is considered in conjunction with the distinctive position of the Constitutional Court of North Macedonia as a *sui generis* institution, whose

jurisdiction, organisation, procedures and functioning are regulated directly in six constitutional provisions and in its own Act, a number of significant challenges and dilemmas inevitably arise. Such a development may prove to be 'a good news' for the rule of law, and it may be an attractive idea for those who perceive it as an 'open door' to 'juristocracy'.

However, under contemporary conditions, the Constitutional Court cannot remain merely a passive interpreter of constitutional norms. Rather, it must function as an institution that understands the Constitution as a living system of values, capable of being applied within real and often complex social circumstances. To achieve this, constitutional judges must, in the process of constitutional interpretation, draw upon the approach commonly referred to in constitutional theory and practice as 'living constitutionalism' (Kostadinovski, 2024a, p. 46). The application of this interpretative approach, in combination with a more pronounced degree of judicial activism, particularly within the *sui generis* framework of self-regulation, inevitably leads to positive outcomes. The question, therefore, arises as to what concrete results have been achieved by Macedonian constitutional judiciary in less than two years. These developments may be observed in two principal directions.

The first concerns situations in which the Constitutional Court has explicitly expanded its own jurisdiction through the actions of the judges themselves. In this regards, the Act of the Constitutional Court of the Republic of North Macedonia, which entered into force on 1 September 2024, introduced two significant innovations: interpretative decisions (Kostadinovski, 2025, pp. 56–62) and special reports on the state of constitutionality and legality within the constitutional order (Kostadinovski, 2025, pp. 60–62).

The introduction of interpretative decisions[1] is neither incidental nor surprising, nor does it constitute a departure from the Court's constitutional position. On the contrary, this mechanism arises from the need to ensure effective protection of constitutionality while preserving the stability of the legal order. Through interpretative decisions, the Court does not limit itself to repealing or annulling legal

[1] Article 36 of the Act of the Constitutional Court of North Macedonia provides: (1) Proceedings for reviewing the conformity of laws with the Constitution, the conformity of other regulations and collective agreements with the Constitution and laws, and the conformity of the programmes and statutes of political parties and citizen's association with the Constitution shall be initiated by a resolution of the Constitutional Court. (2) In the cases referred to in paragraph 1 of this Article, the Court may, at its discretion, set a time limit not exceeding six months for the adopter of the act to amend and/or supplement the act in accordance with the legal positions expressed by the Court in its decision. (3) If the adopter fails to comply with the time limit determined by the Court, the proceedings shall continue, Act of the Constitutional Court – Уставен суд на Република Северна Македонија

provisions found to be incompatible with the Constitution. Rather, it interprets those provisions, situates them within constitutionally permissible parameters and, where appropriate, affords the legislature an opportunity to take corrective action. In this manner, the creation of legal gaps that could directly jeopardise the rights and freedoms of individuals is avoided. This model establishes a distinct legal condition of 'provisional constitutionality' and, at the same time, a particular relationship between the Court and the legislature, one founded not upon superiority, but upon constitutional dialogue. The significance of this innovation lies not in an expansion of the Court's powers, but in its capacity to overcome a practical and important limitation of the classical model. In many instances, the immediate repeal of a statutory provision does not automatically restore a 'state of constitutionality'; rather, it may create a legal vacuum. Such a vacuum may have far-reaching consequences: it may undermine legal certainty, impede the effective exercise of rights, and potentially jeopardise broader public interests.

Accordingly, the interpretative decision constitutes a mechanism designed to balance the requirements of constitutionality, the democratic legitimacy of the legislature and the stability of the legal order. The model follows a clearly defined structure: first, the Court establishes a suspicion of unconstitutionality and articulates its legal positions; secondly, it grants the legislature a period of up to six months within which to bring the contested provision into conformity with the Constitution; and thirdly, if the legislature fails to act within the prescribed time limit, the Court proceeds to adopt a traditional repressive decision. Where the legislature either fails to act within the period prescribed by the Court or disregards the Court's legal positions, the Court activates its traditional constitutional function by repealing or annulling the unconstitutional provision. In such circumstances, responsibility for the ensuing consequences no longer rests with the Court.[2]

In addition to interpretative decisions, the second innovation introduced by the Act of the Constitutional Court is the institution of special reports on constitutionality and legality, provided for in Article 13. Through these reports, the Court does not adjudicate upon an individual case; rather, it identifies broader systemic deficiencies and highlights the need for their remediation. As such, these reports

[2] Thus, the model possesses both preventive and repressive dimensions. Of particular importance is the fact that interpretative decisions do not substitute the will of the legislature; rather, they guide and shape legislative action by defining the constitutionally permissible meaning of legal provisions, without creating new law. In simple terms, the Court interprets and indicates, the legislature acts, and the legal order is preserved without disruption. Interpretative decisions were applied for the first time in the cases U. No 137/2017, U. No. 162/2023, U. No. 163/2023 and U. No. 22/2026 of the Constitutional Court of North Macedonia. Available at: https://ustavensud.mk/archives/30896; https://ustavensud.mk/archives/32824; https://ustavensud.mk/archives/38037, 9. 5. 2026.

constitute a distinct form of institutional dialogue. They do not impose binding obligations, but provide guidance. They do not entail sanctions, but serve as a warning. Nevertheless, their significance derives from the constitutional position of the Court as the ultimate guarantor of constitutionality.[3]

The second direction relates to the implicit expansion of the Court's competences. In addition to the explicit expansion, the Constitutional Court has, over the past two years, broadened the scope of its constitutional authority through judicial activism[4] and evolving interpretative evolution, particularly in relation to the fundamental values of the constitutional order.

- The Court has deepened the scope of constitutional review, extending its scrutiny beyond the substantive constitutionality of legislation to encompass questions of formal constitutionality as well.
- The Court has increasingly relied upon so-called 'meta-legal' arguments, assessing the legitimacy of the objectives pursued by the legislature, the societal justification underlying legislative solutions, and the proportionality of those solutions in achieving their intended objectives.
- The Court has also commenced adopting decisions in situations involving conflict of laws, that is, instances of collision of legal provisions. In this regard, the Court does not have an explicit competence. However, by interpreting the rule of law as a fundamental value of the constitutional order, The Court has held that, in circumstances where conflicting statutory provisions may give rise to arbitrariness in their application – where the authority charged with their application is effectively afforded a discretionary choice between competing legal norms – such situations undermine legal certainty and foreseeability and, consequently, constitute a breach of the rule of law itself.
- Moreover, the Court is increasingly approaching the activation of what has hitherto remained a 'dormant norm', namely a provision of its Act (Article 88) concerning the determination of the manner and time limit for the execution of its decisions. In this respect, the Court is giving growing consideration

[3] This innovation was first applied in cases in which the Court notified the issuers of regulations that its constitutional practice had evolved and that the Court no longer regarded *vacatio legis* as a merely a 'technical' issue, but as a substantive matter. The same approach was adopted with regard to exceptions concerning the entry into force of laws. In this context, the Court recommended that whenever the legislature determines that a law shall enter into force on the day of its publication in the *Official Gazette*, or within a period shorter than that constitutionally prescribed, this must be duly reasoned, providing specifying the grounds, necessity and legitimate aim underlying the application of the exception.

[4] For further discussion on the origins and meaning of judicial activism, see Sunstein, 1984, pp. 51–59; Kmiec, 2004, pp. 1442–1476.

to the adoption of decisions on the merits with deferred legal effect, that is, decisions repealing or annulling provisions with postponed application.[5]

The purpose of this paper is to provide a more detailed examination of this evolution in constitutional judiciary, with particular emphasis on two of the aforementioned implicit competences: the constitutional review of the formal constitutionality of laws and the review of cases involving conflicts of laws.

2. Formal and Substantive Constitutionality

Earlier constitutional-court practice indicates that the Constitutional Court adopted the position that it lacked competence to review the constitutionality of the procedure for the adoption of laws, advancing the argument that its review extends only to the constitutionality of laws once they have been duly enacted. This gives rise to a fundamental constitutional dilemma: which authority is competent to prevent potential arbitrariness on the part of the Assembly, or the President of the Assembly, in the legislative process?

The 'binding force' of the Constitution upon the actions of all state authorities constitutes one of the cornerstones of the principle of the rule of law. The Constitution both establishes and limits state power, delineating the boundaries of politics and political possibility. It is the Constitution that creates and defines the State's internal order in a manner that, through the coherence and harmony of legal norms, establishes predictability and stability, fosters legitimate expectations, safeguards and reinforces state unity, moderates the exercise of political power, and subjects it to legal, that is, constitutional constraints. In this context, the Constitutional Court, as a body of the Republic entrusted with the protection of the Constitution, namely constitutionality and legality, bears an imperative duty to secure such a coherent and harmonious order.[6] From this follows the necessity of a proper understanding and interpretation of Article 108 of the Constitution, in the sense that 'constitutionality' and its protection must be construed in their broadest and most purposive meaning, encompassing not only the substantive conformity of legal norms with the Constitution, but also their formal constitutionality. Such an interpretation of Article 108 implies that even a democratically legitimised legislature, within a constitutional state founded on the rule of law, is

[5] The author has publicly expressed this position in relation to the proceedings concerning Article 218 of the Law on Enforcement, with respect to which the Constitutional Court initiated proceedings for the review of constitutionality.

[6] In German legal literature, constitutional adjudication is rightly described as the 'crowning of the legal system' (see further Kostadinovski & Gjorgievska, 2023a).

not omnipotent. Rather, it is bound not only by the limits expressly prescribed by the Constitution, but also by its underlying requirements and value orientations, as ascertained through judicial interpretation.

The essence of 'constitutionality', thus understood, lies in ensuring that, within a constitutionally ordered state, law prevails over politics. The delineation of the limits of political authority through the Constitution, and their supervision by constitutional courts, constitute the very core of the rule of law and its foundational principle.

'Protection of constitutionality', conceived in this manner, undeniably presupposes, requires and demands not constitutional judicial restraint, but rather determination and resolve, that is, judicial activism on the part of the Constitutional Court.[7]

The question of reviewing formal constitutionality, which is the subject of this analysis, is by no means straightforward; rather, it is complex and multi-layered, as it touches upon a central pillar of democracy, namely the relationship between law, politics and the rule of law, the interaction between law and a democratically elected legislature, and the inherent risk of 'judicial supremacy'.

The conduct of the legislature in accordance with the principle of constitutionality may be understood in both a narrow and a broader sense. The narrower understanding is grounded in a static and isolated conception of parliamentary competence, of the representative function, and of the manner in which these are exercised within the constitutional order. By contrast, the broader understanding of the principle of constitutionality is based on a systemic approach that takes account of the constitutional system as a whole and the integrity of the Constitution, including the institutional framework within which Parliament operates in interaction with other state authorities, and, in particular, the value of political pluralism as a fundamental principle of the constitutional order. This broader perspective is of particular importance where the question of formal constitutionality is examined through the lens of living constitutionalism (see Kostadinovski & Gjorgievska, 2023b), according to which the constitutional system is conceived as a 'living' system, in constant motion and development. Within this framework, the Parliament itself develops an evolutionary and dynamic approach, which, while often following a linear trajectory, may at times exceed the value orientations and limits established by the Constitution. Such transgressions of constitutional boundaries inevitably generate consequences within society and in the interaction among the branches

[7] In the words of the former President of the Federal Constitutional Court, Dr Ernst Benda: "The Court cannot limit its power and function; it must perform its tasks. In relation to the relevant law, it must not extend the separation of powers beyond constitutional limits" (see further Kostadinovski & Gjorgievska, 2023a).

of government – namely the judicial and executive branches – including the Constitutional Court as the bearer of a fourth, constitutional-judicial power.[8]

A fundamental value of the Constitution, frequently regarded as the guarantee for the realisation and affirmation of all other foundational values enshrined in Article 8, is the rule of law. This constitutes a value of such central importance that it gives rise to a series of principles defining its very essence, most notably the principle of legal certainty, which requires that laws be consistent with the Constitution and that all subordinate legislation be consistent with both the Constitution and laws, thereby ensuring harmony, coherence and consistency within the constitutional and legal order. In essence, it is a value that carries the imperative to guarantee, secure and affirm all other fundamental values, constitutional principles and norms. The relationship between the rule of law and the fundamental value of the separation of powers is inherently causal, mutually interdependent and reciprocal. The separation of powers into legislative, executive and judicial branches, together with clearly delineated constitutional competences, their demarcation, and mutual control mechanisms in accordance with the principle of 'checks and balances', constitutes a precondition for the rule of law. Conversely, the rule of law itself is the foundational value that ensures the limitation and distribution of powers as a defining characteristic of a constitutional state governed by the rule of law. Adherence to the constitutionally prescribed limits of each branch of government, together with their mutual oversight, aimed at securing a substantively balanced constitutional order rather than the imbalance often observable in constitutional practice, constitutes a prerequisite both for the limitation of power and for the functioning of a state governed by the rule of law. Finally, above the three branches of government, the Constitution establishes the Constitutional Court, which, by

[8] Such examples are numerous in Macedonian constitutional and parliamentary practice. More prominent examples, well known to the wider public, include the Law on the Special Public Prosecutor's Office (in respect of which the Constitutional Court exercised restraint and did not rule on its constitutionality; the Law on the Public Prosecutor's Office (in respect of which the Court refrained from reviewing formal constitutionality), (see U. No. 22/2020 and U. No. 231/2020 of the Constitutional Court of the Republic of North Macedonia); and the Decree promulgating the Law on Ratification of the Final Agreement for the settlement of the differences described in United Nations Security Council Resolutions 817 (1993) and 845 (1993), for the termination of the Interim Accord of 1995 and for the establishment of a strategic partnership between the parties (U. No. 8/2019, U. No. 16/2019, U. No. 26/2019, U. No. 40/2019 and U. No. 47/2019, Constitutional Court of the Republic of North Macedonia), in respect of which Judge Dr Darko Kostadinovski delivered a separate opinion, arguing that the Court failed to address a serious constitutional gap (Separate Opinion in cases U. No. 8/2019, U. No. 16/2019, U. No. 26/2019, U. No. 40/2019 and U. No. 47/2019, Constitutional Court of the Republic of North Macedonia). In these examples, both material and formal constitutionality of the legislative solutions were subjected to rigorous scrutiny.

virtue of its constitutional position and competences, may be regarded as a fourth constitutional-judicial authority uniquely entrusted with the mandate to guarantee, ensure and protect constitutionality and legality within the legal order.

It follows from the foregoing that the Assembly, as the holder of legislative power, must, in the exercise of its constitutional competences and powers, act within the constitutional framework and refrain from exceeding the constitutional limits, including those embodied in the fundamental values of the constitutional order,[9] which are framework-oriented and capable of diverse normative expressions and formulations. This, in turn, undoubtedly requires that the Constitutional Court should not engage in self-restraint with respect to its authority, but rather exercise its competences and functions with determination and resolve. Such an approach necessarily entails the acceptance of a broader understanding of the principle of constitutionality, grounded in a systemic approach that respects the entirety of the institutional framework of the constitutional system, that is, the integrity of the Constitution. One of the defining features of the relationship between the Assembly and the Constitutional Court lies in the specificity of their institutional dialogue, reflected in the nature of the Court's competences and its influence on the legislative process. This dimension of their interaction, both justifiably and predictably, shifts the balance in favour of the Constitutional Court by recognising its authoritative role in ensuring the constitutionality of legislation, in substantive and in formal terms.

In this sense, the exercise of the legislative function is substantially shaped by the influence of the Constitutional Court, and its case law, together with its established jurisprudence and constitutional-legal positions, operates as a constraint upon political will in the legal regulation of social relations.

Hence, the requirement that a law must comply with the Constitution extends beyond its substantive content to encompass its formal dimension, including adherence to the essential procedural requirements governing its adoption.

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[9] This is a frequent argument and position advanced by Judge Dr Darko Kostadinovski in his separate opinions:

"The Constitutional Court, as the guardian of the Constitution, is obliged to ensure the realisation of the highest fundamental values, principles, and guarantees of the constitutional order. It is precisely through its interpretations that the Constitutional Court gives content and meaning to these fundamental values, principles, and constitutional guarantees, specifying them in their various manifestations. The Court fulfils its duty towards the highest constitutional values by interpreting all other constitutional norms through them, considering that the remaining constitutional provisions represent a normative expression of these fundamental values and principles. The freedom of interpretation enables constitutional judges to decide not only on the facts but also on the law in a manner that, through the prism of the entirety of the highest constitutional values, principles, and guarantees, prevents the consequences arising from the application of provisions that do not meet constitutional standards."

The procedural aspect of law-making requires adherence to the elements that ensure the legal validity of a statute and determine its legal force and legal effect within the hierarchy of legal acts. The fundamental elements of the legislative procedure regulated by the Constitution include the entities entitled to propose legislation, the voting majorities required for deliberation and decision-making, and the procedures governing the promulgation and entry into force of enacted laws. In all other respects, the procedure is regulated partly by the Law on the Assembly and, more comprehensively, by the Rules of Procedure of the Assembly. The full and unconditional observance of these requirements ensures the formal constitutionality of a law. In our view, deficiencies of a formal nature in the enactment of legislation, by their very nature, require its annulment in its entirety (*annulation totale*), since formal or procedural unconstitutionality constitutes a 'failure to comply with the Constitution', that is, a discrepancy between the manner in which a law was enacted and the procedure prescribed by the Constitution. Accordingly, such deficiencies must be subject to constitutional judicial sanction.[1011]

Constitutional practice in the Republic of North Macedonia, for a considerable period, refrained from undertaking constitutional judicial analysis or imposing constitutional sanctions in response to increasingly frequent departures from the general rules of procedure, whether as a consequence of the perceived political urgency of particular legislative solutions or as an expression of the political supremacy of the parliamentary majority. These deviations became particularly evident in the determination of the type of legislative procedure, and in the increasingly problematic recourse, from the standpoint of societal necessity and justification, to shortened and urgent procedures, as well as procedures conducted under the so-called 'European flag'. They were also apparent in departures from the general rule governing the entry into force of laws and in procedural deficiencies, such as the rejection of duly submitted amendments. It is not an exaggeration to suggest that, in practice, the ordinary legislative procedure has, to a significant extent, been

[10] For example, at its session held on 14 May 2020, the Constitutional Court adopted a Decision repealing the Law on Prevention and Protection against Discrimination, *Official Gazette of the Republic of North Macedonia*, No. 101/2019, on the ground that, following a presidential veto, the law had been adopted for a second time in violation of Article 75(3) of the Constitution. Specifically, instead of being adopted by the constitutionally required majority of the total number of Members of Parliament, the law was adopted with the support of only 55 Members (U. No. 115/2019-1, Constitutional Court of the Republic of North Macedonia).

[11] In this particular case, the question arises whether the President of the Republic, by signing the decree promulgating a law adopted by an unconstitutional majority, and thereby effectively declining to assess its formal constitutionality and allowing such a law to enter the legal order, notwithstanding its subsequent repeal by the Constitutional Court, acted in accordance with the Constitution or in violation of it.

supplanted by its exceptions, most notably through the use of the 'European flag', purportedly justified by considerations of political urgency. Such frequent derogations from the general procedural framework governing the legislative process have naturally brought to the fore the question whether such conduct on the part of the legislature is compatible with the Constitution, that is, whether it satisfies the requirement of constitutionality. In other words, the key issue is whether decisions concerning the (mis)use of the aforementioned procedural mechanisms fall exclusively within the imperative and sovereign competence of the legislature and, as such, are in substance exempt from constitutional judicial review. The views among the judges themselves have been markedly divided. Those who advocate a review of constitutionality in its broadest sense, aimed at ensuring genuine and effective constitutional protection and the meaningful exercise of constitutional judicial review, both substantive and formal, align themselves with what may be termed the doctrine of substantive constitutional protection. By contrast, others subscribe to what may be described as a 'deferential or merely cosmetic' constitutional protection. The author's own adherence to a model of substantive constitutional judicial protection is particularly justified when account is taken of the fact that a passive and restrained role of the Constitutional Court, as reflected in its established case law, may in effect operate as an incentive for the legislature to resort to the misuse of prescribed procedural rules.

What follows is an overview of the Constitutional Court's cases in which it has declined competence to review the formal constitutionality of laws:

In case U. No. 14/2020, the Law on the Public Prosecutor's Office was challenged in its entirety, together with certain of its provisions and the Decree promulgating the Law. In this case, which involved multiple applications, the applicants alleged a number of violations of a formal nature. Notwithstanding the seriousness of these claims, the Court, by a majority of votes, relied upon its long-standing practice, stating: "The constitutional provisions do not regulate the procedure preceding the adoption of laws, nor do they govern issues such as by whom a draft law was signed, how many times it was considered and by which parliamentary committees, whether it was adopted under a shortened or regular procedure, how many readings it underwent, whether it was adopted under the so-called 'European flag', and so forth. These issues fall outside the competences of the Constitutional Court for the purposes of constitutional judicial review, since such a review would entail an assessment of the conformity of the law with the Rules of Procedure of the Assembly, which, in Chapter IX (Articles 132–162), regulate the legislative procedure, and such matters do not fall within the Court's jurisdiction. Accordingly, from a constitutional standpoint, the only issue that may be subject to constitutional judicial review in assessing the constitutionality of a specific law is whether, at the stage of

voting, it obtained the constitutionally prescribed special majority. The Constitutional Court has no competence to review whether the procedure for the adoption of the challenged law was conducted in conformity with the Rules of Procedure of the Assembly, nor to re-evaluate the conduct of the competent authorities during the procedure preceding the adoption of the law, which position has been consistently expressed in cases U. No. 161/2011, U. No. 20/2013, U. No. 53/2013, and others."

Throughout these proceedings, the Court has consistently relied upon the same reasoning in declining competence, as evidenced by Resolutions U. No. 161/2011, U. No. 20/2013, U. No. 53/2013, and others.

From the cited positions, it is evident that the Court displayed a reluctance to engage in a substantive examination of allegations concerning serious violations of procedural rules in the enactment of legislation. This approach was consistently maintained until 2025, and such self-limitation, in effect, directly legitimised the conduct and omissions of the legislature, including practices that may properly be characterised as abuses. The legislature increasingly appeared to benefit from this institutional deference afforded by the Constitutional Court, treating it as a form of 'acquired constitutional-legal territory'. The latitude granted by the Constitutional Court to the Assembly, through the recognition of virtually complete autonomy in this domain, departs from the very purpose and essence of constitutional judiciary and of the Constitutional Court as the guardian of the Constitution.

Living constitutionalism (McBain, 1928, pp. 1–271), as a theory whose non-application under contemporary conditions would render constitutional judiciary virtually 'meaningless', does not merely entail the normative adaptation of the Constitution to evolving social realities; it also requires the adaptation of the Constitutional Court itself through a broader interpretation of its own competences, the embrace of judicial activism, and the alignment of its case law with contemporary constitutional realities. Otherwise, legitimate questions inevitably arise as to who is to restrain potential arbitrariness on the part of the legislature and its majority. In this context, after three decades of restraint, the Constitutional Court ultimately demonstrated resolve and, in 2025, decided to bring this deficiency in constitutional judiciary to an end. Judicial convictions prevailed to the effect that the principles of constitutionality and legality should not be interpreted in a strictly formalistic and restrictive manner, as requiring only conformity of lower-ranking legal norms with higher-ranking ones, to the exclusion of any 'meta-legal' approach to interpretation, including, where appropriate, recourse to criteria extending beyond the text of the Constitution itself (Jovičić, 2006, p. 65).

The meta-legal dimension finds its most significant application in the sphere of the development, as well as the limitation, of human rights and freedoms. The profound transformations that have occurred across all areas of social life, together

with the challenges accompanying such changes, have generated new paradigms and, at the same time, a complex relationship between the development and the limitation of human rights and freedoms, one that was not foreseen by written constitutions and that requires careful balancing and deliberation, extending, in part, beyond the scope of constitutionally prescribed norms. In this regard, categories such as the 'essence of the guaranteed right', 'necessity in a democratic society', 'the proportionality of limitations (or of measures contained in legislative solutions) to the attainment of a legitimate aim', and 'societal justification' inevitably require a more complex understanding of social reality, as well as of the legal and political environment as a whole. This constitutes not only an obligation of the legislature but, to an even greater extent, a responsibility of constitutional judges.[12]

The departure from this decades-long practice occurred through the following two cases, in which the Court adopted such an approach. The Court's reasoning is of particular significance, most notably for its synthesis of so-called meta-legal arguments and its interpretative engagement with the fundamental values of the constitutional order.

Acting in case U. No. 186/2024, on 20 May 2025, the Constitutional Court repealed Articles 17 and 18 of the Law Amending the Electoral Code. In its reasoning, the Court, *inter alia*, explained the evolution of its approach in the following terms: "Political pluralism, as a fundamental value of the constitutional order, constitutes the foundation of a democratic society and is expressed primarily through the multi-party system, within which political parties, as representatives of diverse political options, compete for the exercise of power trough periodic elections at both national and local levels. However, political pluralism is not exhausted solely through multi-partyism; it extends far beyond it and encompasses the direct participation of citizens in the exercise of power, as well as a plurality of political views

[12] Material conformity with the Constitution is closely linked to formal conformity, since any material contradiction of a law with the Constitution in essence constitutes a violation of the Constitution, that is, its amendment in a constitutionally prohibited manner. In other words, material unconstitutionality simultaneously constitutes formal unconstitutionality, as a materially unconstitutional law regulates a matter already regulated by the Constitution, and its unconstitutional operationalisation leads to a so-called 'soft amendment' or revision of the Constitution. Accordingly, material unconstitutionality may be understood not only as a breach of the Constitution but also as its amendment, which may be legally effected if the Constitutional Court shows restraint and fails to sanction and remove such a violation. Thus, the material unconstitutionality of a law may be subsumed under the concept of formal unconstitutionality of constitutional revision. The adoption of a law materially contrary to the Constitution constitutes a so-called 'concealed formally unconstitutional revision of the Constitution'. In other words, by adopting such a law without constitutional-court sanction, the Constitution is effectively altered without amending its text. In this case, the unconstitutionality of the law is both material and formal in nature (for further analysis, see Rajić, 2017).

and options. These are not necessarily articulated exclusively through political parties, but may also find expression through the political engagement and activism of citizens acting as individuals, outside political parties, nominated and supported by groups of citizens or by civil society organisations…"

The Court considers it necessary to reiterate that the practice of submitting draft legislation to the Assembly without a reasoned explanation for significant proposed amendments is impermissible in a democratic society founded upon the principle of the rule of law, as it undermines legal certainty and the foreseeability of legal norms, which constitute essential elements of that principle.

The Court considers that the legislature, in preparing amendments relating to the number of required supporting signatures, ought to have adopted a more rigorous approach. It should have undertaken a prior analysis of the relevant legislative provisions and their practical application, and provided a reasoned justification for the objectives and purposes sought to be achieved by the proposed amendments. However, they failed to do so in the present case. Instead, the proposed amendments to the Electoral Code were adopted under a shortened procedure, in respect of the contested provisions, in an entirely non-transparent manner and without public debate, and indeed without any substantive discussion at a session of the Assembly, immediately preceding the 2024 elections. This approach likewise departs from the international standards articulated by the Venice Commission, which recommend that fundamental aspects of electoral law should not be subject to amendment within at least one year prior to elections. In its *Code of Good Practice in Electoral Matters*, the Venice Commission emphasised that electoral legislation must serve to promote, rather than restrict, the pluralism of political views and opinions. It must create the conditions for a pluralistic political environment, for fair electoral competition, and for a framework in which participation is encouraged not only for political parties, but also for other groups and individuals in political and public life. Such a framework should enable citizens, acting as individuals and as independent candidates, to freely express and advance their views and opinions (Venice Commission, *Code of Good Practice in Electoral Matters*, 2002).

In the Court's assessment, the contested legislative provisions do not serve the realisation of the aforementioned objectives of electoral legislation. By increasing the number of supporting signatures required for the nomination of independent candidates, they effectively exclude such candidates from the electoral process, thereby depriving them of the ability to exercise the right to stand for election as an element of passive suffrage. Consequently, the electoral rights and the right to political participation of the citizens who support them are likewise curtailed, as their choice is reduced solely to party-affiliated candidates and to political engagement within the framework of political parties. The restriction of the number of

potential electoral subjects participating in the electoral process deprives elections of their democratic character as free and fair contests, directly endangering and weakening political pluralism as a fundamental value of the constitutional order under Article 8, paragraph 1, indent 5 of the Constitution.

The second case is U. No. 163/2023, decided on 12 February 2025, in which the Court adopted an interpretative decision. In this case, the Court initiated proceedings for the review of the constitutionality of the Law Amending the Criminal Code and set a time limit of six months for the Assembly to amend and/or supplement the Law in accordance with the Court's positions articulated in the reasoning of the Resolution. The Court's reasoning, set out below, reveals a significant departure from its long-standing constitutional case law: "Having regard to Article 108 of the Constitution, according to which the Constitutional Court is a body of the Republic that, in safeguarding the Constitution, bears the imperative duty to ensure a state of constitutionality and legality, thereby securing a coherent and harmonious legal order, the interpretation of that provision must be undertaken in its broadest and most purposive sense. This entails the necessity that laws, in addition to satisfying the requirement of substantive constitutionality, must also fulfil the requirement of formal constitutionality. Such an interpretation of Article 108 implies that even a democratically legitimised legislature in a constitutional state governed by the rule of law 'is not omnipotent', as it is bound not only by the limits of its competences as determined by the Constitution, but also by the requirements and value orientations inherent therein. The essence of constitutionality, thus understood, lies in ensuring that, within a constitutionally regulated state, law prevails over politics. In this context, it is the Constitutional Court that is entrusted with ensuring that all branches of government, together with their regulations, acts, procedures and actions, remain bound by the Constitution and its value framework, both in substantive and formal terms. The delineation of the limits of political power by the Constitution, and their supervision by the Constitutional Court, constitute the very core of the rule of law and the foundation of a constitutional state. It follows that the fundamental duty of the legislature, in the exercise of its constitutionally prescribed competences, is to act in accordance with the principle of constitutionality."

The procedural aspect of the enactment of legislation entails compliance with the elements that ensure the legal validity of a law, in the sense that the procedures and processes through which legislation is enacted themselves confer legitimacy upon it. These elements include the existence of a constitutional basis and authorisation for the adoption of the law, the participation of constitutionally authorised proposers, and compliance with the constitutional, statutory and procedural requirements governing the legislative process. The full and unconditional observance of these elements ensures the formal constitutionality of the law.

The essence of pluralism as a fundamental value of our constitutional order is not exhausted merely by the positive obligation of the state, as guarantor of pluralism, to enable citizens to have diverse political options effectively expressed through participation, under equal and fair conditions, in free and democratic elections. Accordingly, in the Court's view, the essence of pluralism is equally relevant in the process of law-making itself, that is, in the legislative procedure through which the citizen's representatives, by means of a diversity of political proposals and ideas, participate in the regulation of social relations, as well as in the amendment of existing legal arrangements governing those relations.

The decision to implement amendments to the Criminal Code through a procedure employing the 'European flag', justified on the basis that the amendments were intended to align domestic law with European legislation, is constitutionally permissible and acceptable only insofar as it concerns criminal offences in respect of which the legislature relies upon a specific, clear and precise European directive. This cannot be said of the amendments relating to abuse of official position and authority, negligent performance of official duties, and criminal association, as no such clear and precise directive was identified in respect to these matters. Thus, the legislature, in altering penal policy, an area undoubtedly of significant public interest, acted without providing an adequate justification or sufficient arguments concerning the legitimate aim pursued, the societal justification of such changes, or their necessity in a democratic society. The sole explanation advanced for these amendments was that they sought to align domestic law with the practices of certain European states in the sphere of penal policy relating to abuses of public office. In such circumstances, according to the Court, the very substance of political pluralism is narrowed and constrained, as significant legislative changes of this nature are enacted through a shortened procedure, without the possibility of broader public, professional and expert debate, and without affording the public an opportunity to present arguments and engage in meaningful discussion.

Furthermore, the adoption of amendments to the Criminal Code through a shortened procedure, where the use of the so-called 'European flag' is manifestly unfounded and constitutes an abuse, and where no legitimate aim, broad societal justification, or necessity has been demonstrated, gives rise, in the Court's view, to a well-founded suspicion regarding the formal constitutionality of the law and, consequently, compliance with the principle of constitutionality as a whole. Such formal deficiencies of the law constitute a 'failure to comply with the Constitution' and a discrepancy between the manner in which the law was enacted and the constitutionally prescribed procedure for its adoption, which must be subject to constitutional judicial review and sanction."

3. Conflict of Laws

In a manner analogous to its restraint in reviewing the formal constitutionality of legal acts, the Constitutional Court has, over several decades, developed a consistent practice of declaring itself incompetent in cases involving a conflict of laws. As the Court has stated: "With regard to the allegations contained in the initiatives, which seek a review of the mutual consistency of provisions within the same law, a review of the conformity of a challenged law or its provisions with provisions of other laws, or a review of their conformity with the Rules of Procedure of the Assembly or the Rules of Procedure of the Government, this Court, pursuant to Article 110 of the Constitution, has no competence to act" (U. No. 14/2020, U. No. 36/2020 and U. No. 192/2020). Such reasoning has typically underpinned the Court's reluctance to engage in judicial activism and its failure to apply the theory of living constitutionalism as a method of interpreting the fundamental values of the constitutional order. As a consequence, the Court has refrained from constitutionally sanctioning provisions that are in conflict, whether within the same law or across separate laws, even where such conflicts directly infringe fundamental values, in particular the rule of law and its core principles of legal certainty, legal foreseeability, and the prohibition of arbitrariness.

However, as previously indicated, a significant shift has emerged in case U. No. 113/2022-1 of 21 March 2023, in which the Court repealed Article 4 of the Law Amending the Law on Salaries and Other Allowances of Elected and Appointed Officials in the Republic of Macedonia, as well as Article 1 of the Law Amending the Law on Salaries and Other Allowances of Elected and Appointed Officials in the Republic of Macedonia. Of particular significance is the reasoning of the Court's decision: "The determination of the method for calculating the remuneration of elected and appointed officials undoubtedly constitutes a matter of statutory regulation, and in that regard, it is for the legislature to decide whether the base for calculation shall be determined by reference to the average salary earned, or whether the amount of the base shall be fixed directly in the law itself.

Nevertheless, irrespective of the approach adopted, the legal norms governing this matter must be clear, unambiguous and foreseeable, and must not permit divergent interpretations that could give rise to uncertainty and inconsistent application in identical situations. Indeed, the requirement of clarity and precision constitutes one of the fundamental elements of the principle of the rule of law, as a foundational value of the constitutional order enshrined in Article 8, paragraph 1, indent 3 of the Constitution.

However, in the Court's assessment, the contested legislative regulation of this matter is not consistent with this principle. The amendments to the method

for determining the base for the calculation of salaries of elected and appointed officials have resulted in a situation in which two norms, that is, two legal rules for determining the salary base, exist simultaneously. The first, under Article 11 of the Law, provides that the base is to be determined according to the average salary earned in the previous year, as established by the State Statistical Office. The second rule, contained in the contested provision of Article 4 of the Law Amending the Law on Salaries and Other Allowances of Elected and Appointed Officials in the Republic of Macedonia, fixes the base at 25,726 North Macedonian Denars, which, following the 4 per cent adjustment provided for in the second contested provision, amounts to 26,755 North Macedonian Denars as the base currently in force and applied. At the same time, the provision of Article 11 of the Law remains in force."

In essence, this means that the Court established that, within one and the same law, there exist two different legislative solutions governing the same legal matter and regulating the exercise of the same right in divergent ways, thereby creating a situation of arbitrariness for those charged with applying the law in specific cases. Such a situation, viewed from a constitutional perspective through the prism of the rule of law and its fundamental principles of legal certainty and the prohibition of arbitrariness, is not merely unacceptable, but also constitutionally impermissible. Moreover, the unconstitutionality of such legislative solutions gives rise to a violation of the principle of equality of legal subjects before the Constitution and the laws.

4. Conclusion

Both the explicit and the implicit expansions of competences, conditionally speaking, represent significant innovations in Macedonian constitutional judiciary. The dilemma among judges as to whether this approach constitutes an expansion of competences, or rather their substantive fulfilment through judicial activism informed by the theory of living constitutionalism, undoubtedly persists. In the author's view, however, the answer is unequivocal: it does not.

For it is precisely here that the essence of contemporary constitutional adjudication lies. The Court is no longer merely a negative legislator. It is also an interpreter, a corrector, and a guide of the legal order; it shapes and directs its development. Nevertheless, this evolution must have its limits.

In conditions in which the Court possesses the capacity for self-regulation and for the development of both explicit and implicit competences,[13] there is always a

[13] In essence, through these significant developments, both explicit and implicit, the Constitutional Court is aligning itself with contemporary trends in European neo-constitutionalism.

risk of a transition into juristocracy – a state in which the Court assumes the role of the legislature. Such a development would not strengthen constitutionality, but rather undermine it. The key challenge, therefore, is not whether the Court should be active, but how far its activity may legitimately extend. The balance between the protection of the Constitution and respect for the democratic legitimacy of the legislature constitutes the very essence of constitutional judiciary. Without such a balance, no institution can preserve its constitutional role.[14] This significantly increases the responsibility borne by constitutional judges. In the contemporary constitutional system, this relationship is not one of hierarchy, but of mutual cooperation. The Court does not assume the role of the legislature; rather, it influences legislative actions, sets constitutional standards, and defines the limits imposed by the Constitution. This influence may be direct, through repeal or annulment; indirect, through reports; or combined, as in the case of interpretative decisions.

It is only natural that, under such new circumstances, tensions will arise between the legislature and the Constitutional Court, and this is entirely to be expected, given that, over a prolonged period, the Constitutional Court remained passive or excessively deferential, thereby affording the legislature a certain degree of constitutional comfort. Undoubtedly, the legislature will require time to adapt to these new conditions, that is, to the changes taking place within the Constitutional Court. The Assembly is already experiencing the pressure resulting from these developments, but over time and with the further development of constitutional culture, it will adjust accordingly.

All these innovations represent a new model of constitutional-judicial action, a new mode of communication with the legislator, and a new phase in the development of constitutional judiciary. Their essence, notwithstanding the fact that they

In a nutshell, this entails a departure from strict formalism, that is, a movement away from the rigid Kelsenian concept of the Constitutional Court as a 'negative legislator', towards a model in which the boundaries between the negative and the positive legislator become increasingly blurred. Accordingly, the Constitutional Court actively participates in shaping the development of the legal order, naturally within the limits imposed by the Constitution.

[14] The common denominator of both the explicit and the implicit developments, and their ultimate objective, is inherently linked to the independence and autonomy of the Constitutional Court. At the Sixth Congress of the World Conference on Constitutional Justice, the Madrid Declaration affirmed that constitutional justice can fulfil its role only where the autonomy and independence of constitutional courts are fully guaranteed. Such independence is not an end in itself, but a necessary condition for ensuring the supremacy of the Constitution, the effective protection of fundamental rights, and the maintenance of the balance of powers in a state governed by the rule of law. The reason for this is simple yet fundamental: judicial independence constitutes a human right, inseparably linked to the individual's right of access to justice, the right to a fair trial, and the right to equal legal protection, as recognised in the Declaration adopted at the Ninth High-Level Meeting in Cairo.

may also be understood as a form of 'soft revision' of the Constitution, is directed towards safeguarding the Constitution without disrupting the legal order, and towards correcting the legislature without supplanting its role. Their purpose is to ensure constitutionality without generating legal uncertainty. Ultimately, these instruments pursue a single objective: the construction of a constitutional order grounded in dialogue, responsibility, and respect for the Constitution. There can be little doubt that these developments will contribute to a higher level of constitutional culture.

However, this new model also carries risks and challenges. Judicial activism does not mean arbitrariness. These mechanisms must therefore be applied with caution, supported by well-reasoned justification and guided by a clear awareness of their limits.

The core of this thesis is the affirmation of the concept of 'moderate living constitutionalism' (see Strauss, 2015, pp. 16–18) through the acceptance of the essential characteristics of the 'living Constitution' as a theory of constitutional interpretation, while at the same time incorporating elements of 'moderate originalism'. Within this seemingly complex symbiotic relationship, the fundamental point of connection is the 'principle of limitation'. It is precisely this principle that generates the requisite moderation in the interpretation of constitutional provisions. According to this principle, in interpreting the constitutional meaning of a provision, three conditions must be satisfied. First, the minimum original meaning of the constitutional text must be respected. Second, strong and reasonable arguments must be provided concerning both the original meaning of the provision under interpretation and the degree of its constitutional indeterminacy. Third, equally strong and reasonable arguments must be advanced in support of the evolved meaning of that provision, that is, the necessity of interpreting and understanding the provision in the light of, and in response to, changed social realities. The same applies in the sphere of constitutional jurisprudence (Kostadinovski, 2024b, p. 1092).

Within the model the author advocates, the reconciliation of the two competing approaches, originalism and living constitutionalism, is achieved through two essential elements. The first is the principle of limitation, which prevents judges from construing the Constitution on the bases of their personal moral, ethical, ethnic, religious, or political convictions and ideologies, and confines constitutional interpretation to minimum objective capable of verification in a specific case, such as limitations deriving from generally accepted norms of international law or standards developed by the European Court of Human Rights. The second is the requirement of reasoned, robust, and compelling argumentation in support of the evolved meaning of a constitutional provision. It is the strength of

the reasoning that confers authority upon a court's decision, whereas the absence of reasoned and substantiated decision adopted through the prism of living constitutionalism can only reinforce the concerns of originalists regarding 'constitution-making from the bench'.[15]

"The legislator is bound by the Constitution; the constitutional court is bound by its interpretation of the Constitution." - Hans Kelsen

In addition to these imperative constraints on judicial activism, a further safeguard against judicial arbitrariness lies in the following consideration: the two competences through which the Court extends its authority by means of the implicit interpretation of constitutional norms do not entail their mechanical application in every case involving a violation of formal constitutionality or a conflict of laws. Rather, it is the duty of constitutional judges to assess, in each individual case, the significance of the alleged violation of formal constitutionality or legislative conflict, its consequences, and the public interest involved, in order to determine whether judicial intervention is warranted. Within this additional form of judicial self-restraint, one may discern the growing importance of so-called meta-legal arguments.

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[15] "The scales of justice rest in the hands of judges. It is the most delicate scale in the world. To hold it properly, knowledge of the law alone is not sufficient, a refined sense of conscience and high moral integrity are also required. Judges must, above all, possess conscience, respect the law, and act with integrity. I define conscience as an inner human quality, an inner sense that enables one to distinguish right from wrong. Although abstract, it is a universally recognised concept. In my view, conscience does not deceive. It neither advises nor compels improper conduct. Conscience is always oriented towards truth." — Kadir Özkaya

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