
Law Making Activity of the Constitutional Court: Comparative and Legal Analysis

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Abstract: This article analyzes the specifics of the documents of the Constitutional Court. In addition, according to the content of the adopted documents, the role of the Constitutional Court as a positive or negative lawmaker has been analyzed based on national and foreign experience. Analyzed the opinions of legal scholars in this regard and developed conclusions and recommendations.

Keywords: Constitutional Court, precedent, positive legislator, negative legislator, normative.

The Constitutional Court of Uzbekistan, by its decisions and the legal positions contained in them, not only restores constitutionality, but also actively contributes to the development of current legislation based on the principles of the current Constitution, makes a great contribution to the development of the general theory of law and branch legal sciences, to the theory of the constitution, constitutional law, constitutionalism generally. This is due to the high status and responsible powers of the Constitutional Court, which has the right to check and control the content of contested laws, a number of by-laws and international treaties that have not entered into force. In general, one can state the special, in some respects even the dominant, role of the Constitutional Court in the national judicial system.

Judicial acts, by their legal nature, have different characteristics from acts of other bodies of state power. In the legal literature, such features are "firmness (irrefutability), exclusivity, coercion, and the condition of enforcement [1, p-508]." Although qualities such as binding and enforceable also apply to the system of documents of other public authorities, it is these features that increase the importance of justice documents as public authorities. Also, the legal force of Constitutional court documents is higher than that of general and arbitration court documents [2].

In the scientific community, as is known, there is no consensus either on issues related to the general normative nature of court decisions, or on issues of legality and admissibility of judicial lawmaking. In the literature, there are both positive points of view in resolving this issue, and negative ones.

This article aims to reveal the role of the Constitutional Court in the system of state power of the Republic of Uzbekistan in accordance with the specifics of its decisions.

Theoretically, Gans Kelzen was the first scholar to conceptualize his traditional judicial control as a negative legislator. Theoretically, Gans Kelzen was the first scholar to conceptualize his traditional judicial control as a negative legislator [3, p-197]. Historically and practically, the first expression of the powers of the constitutional courts as a negative legislator was taken in 1803 from his case against Marbury Madison. Kelsen's argument regarding the role of the constitutional court as a negative legislator led him to distinguish between two types of legislations, positive and negative. A positive legislation means any action that adds a rule to a given system of law by an elected assembly[4]. The decision of

the constitutional court by which a law was annulled has the same character as a law, which abrogated another law [5]. “The annulment of a law is a legislative function, an act — so to speak— of negative legislation. A court which is competent to abolish laws — individually or generally – functions as a negative legislator [6, p-268-269]. From these analyses, we can deduce that negative lawmaking manifested in decisions on unconstitutionality of normative acts or their individual provisions. By canceling the norm, the Constitutional Court creates a new norm. Decisions of the Constitutional Court repealing a normative act in all cases have a normative nature.

Some scholars point to the powers of the Constitutional Court as a positive lawmaker, such as the interpretation of law, the function of resolving political disputes in the activities of state bodies, and the appropriateness of laws. In particular, A. Brever Kerias, a professor at the University of Venezuela, describes the Constitutional Court not only as a "positive lawmaker" but also as a "constitutional lawmaker", with the following characteristics of positive lawmaking:

First, the role of Constitutional Courts interfering with the Constituent Power, enacting constitutional rules and even mutating the Constitution; Second, the role of Constitutional Courts interfering with existing legislation, assuming the task of being assistants to the Legislator, complementing statutes, adding to them new provisions, and also determining the temporal effects of legislation; Third, the role of Constitutional Courts interfering with the absence of Legislation due to absolute and relative legislative omissions, acting in some cases as Provisional Legislators; and Forth, the role of Constitutional Courts as Legislators on matters of judicial review [7]. Paata J Javakhishvili stated that: “Intra vires to the all cases considered in this authority, Constitutional Court not only made unconstitutional norms void, but also go farther from negative legislator’s authority borders and re-acquired a new positive legislator’s function, by creating new norms” [8]., similarly, Stone Sweet defined the constitutional courts in Europe and France as positive legislators by stating “today, constitutional judges function as “positive legislators,” with transformative effects on parliamentary governance” [9].

The main reason for the assessment of the courts as lawmakers is that they have a broader and deeper approach to reality in the process of law enforcement.

According to D.Petrova, "judicial law" often goes beyond the legislative process in its development, because it takes into account a more mobile and faster changing legal reality [10, p. 19]. The criteria for the Constitutional Court to consider a legislator positively or negatively differ depending on the models of constitutional review.

In USA Courts of any level have the right to exercise constitutional review, including through the interpretation of the Constitution (however, in many states this is prohibited "outside the scope of the case). Although judicial review is decentralized, lower courts make only "best guesses" as to the meaning of certain provisions of the Constitution, while the position of the US Supreme Court is final, and the issue of constitutional law becomes resolved after the decision of the Supreme Court [11, p. 59].

There are three rules which the American courts perform constitutional control: 1) Plain Meaning Rule statutes are to be interpreted using the ordinary meaning of the language of the statute. In other words, a statute is to be read word for word and is to be interpreted according to the ordinary meaning of the language; 2) The Mischief Rule The rule considers not only the exact wording of the statute, but also the legislators' intentions in enacting it; 3) The Golden Rule - is that the words of a statute must prima facie be given their ordinary meaning. It is the addition and subtraction in the meaning of the statute. It usually avoids unjust or

absurd results in sentencing. This rule allows the court to alter the structure of sentences and give unusual meaning to particular words. In case of any ambiguity, the court interprets the law. The word interpretation means a simple explanation and understanding of a statute.

These provisions shows that the American system of constitutional control rather in a "positive" direction.

In addition to interpreting the constitution, constitutional courts have been assigned to annul unconstitutional rules with binding effect. Finally, by granting the constitutional court the power as a negative legislator, the legislature will be forced to enact a new law or replace the impeached rules. This system has not been restricted to only European countries such as Germany, Italy, France and Spain but has also spread to many Latin American countries including Brazil, Portugal and Venezuela, as well as some Middle Eastern countries, such as Iraq and Egypt.

For instance, according to the Article 93 of the German Basic Law and Article 90 of the Law on the Federal Constitutional Court of the Federal Republic of Germany provides for the filing of a constitutional complaint. When the complaint is satisfied, the decision of the Constitutional Court of the Federal Republic of Germany indicates exactly which provision of the Basic Law of the Federal Republic of Germany was violated, by what actions or inaction. When making a decision arising from a specific court case, the Constitutional Court has the right to return the case to the competent court. When a normative act is declared inconsistent with the Basic Law of the Federal Republic of Germany, the act is declared invalid.

In Italy, according to the Constitution of 1947, the review of the constitutionality of laws (as a general rule is carried out at the request of courts of general jurisdiction) administered by the Constitutional Court. If the Court declares any law unconstitutional, its provisions become invalid the day after the official publication of the Court's decision (Article 136 of the Italian Constitution).

In Indonesia there are signs of positive legislation. The new norms born from the decision of the Constitutional Court which is positive legislature, and it directly has legal implications for the wider community. The degree is equivalent to the Act because it is final and binding. Reposition of the Constitutional Court with the issuance of a monumental verdict is said to be a verdict containing a new principle which is to refine the old principle without neglecting the old principle contained in the previous judge's decision on similar and similar matters [12, p. 1104-1111].

Article 81 of the Constitution of Japan dated May 3, 1947 succinctly formulates the relationship between the powers of the Supreme Court of Japan and other branches of government in terms of constitutional control: the Supreme Court is the highest court competent to decide on the constitutionality of any law, order, regulation or other official act. If a law is declared unconstitutional, a copy of the decision is sent to Parliament and the Cabinet. A lawsuit on the unconstitutionality of a normative act must be filed with the court of first instance.

The Constitutional Court is the only authority vested with ultimate jurisdiction to review of constitutionality, so that Article 221 of Portuguese Constitution states "The Constitutional Court is the court that has the specific power to administer justice in matters involving questions of legal and constitutional nature." The starting point in explaining the role of Portuguese Constitutional Court is that it is entrusted with a control function with a negative nature, not participating in the active lawmaking decision nor ordering another authority to act. The Court's power is to ascertain and declare whether the norm is in accordance with, or

in contravention of, the provisions and principles of the Constitution. That means it possesses a cassatory function and restricts itself to annul norms that do not comply with the Constitution [13].

In Bahrain, the article 106 of the Constitution of February 14, 2002 is devoted to the Constitutional Court of Bahrain. Its competence includes the observance of the constitutionality of laws. A court decision that the text of a law or regulation is not constitutional has direct effect. Thus, if the decision of the Constitutional Court of Bahrain on the unconstitutionality refers to the text of the Criminal Code, convictions based on such a text are considered null and void and have no legal effect. The decision of the court is binding. Based on these provisions of the Constitution of Bahrain, the Constitutional Court of Bahrain will not only be used to abolish non-constitutional laws, but also be applied in specific criminal and other cases, outlining a trend towards “positive” law-making activity.

The analysis of foreign experience shows that although the bodies of constitutional review are theoretically recognized as judiciary branch, in practice the role of the Constitutional Court in lawmaking is growing.

Today, gaps in law, lack of laws, legislative omissions, or absolute or relative shortcomings of the legislature, lack of an effective mechanism for enforcing constitutional court decisions, can often lead to the Constitutional Courts assuming the role of legislative assistant.

The essential function of constitutional courts is to guarantee the supremacy and integrity of the constitution by declaring unconstitutional or (in some states) annulling State acts that violate it. Thus, constitutional courts are subject to the modern principle of separation of powers and consequently they are not legislators, as the legislative function is assigned in the constitution to the legislative branch. The functions as a positive legislator is given to constitutional courts to assist legislators accomplish their function and fill the legal gaps created by the failure of the legislators [14].

Based on the above analysis, it can be concluded that the role of the Constitutional Court in the system of state power and its decisions are unique. Constitutional courts can help the legislature to perform its functions, but they cannot replace the legislature, i.e., they cannot adopt laws. Laws are adopted by parliament with its strong democratic legitimacy to act on behalf of the sovereign. None of the Constitutional Courts have the normative power to create new pieces of legislation. Unlike the models of constitutional control of foreign countries, the Constitutional Court in Uzbekistan is not literally engaged in lawmaking. The Constitution of the Republic of Uzbekistan enshrines the Constitutional Court as a clear body of judicial power. Accordingly, it is not primarily engaged in legislative activities.

However, as noted by the Chairman of the Constitutional Court of the Republic of Uzbekistan M. Abdusalomov, “it should be noted that constitutional justice in our country is a relatively new and developing direction in the national legal system. It is known that the development of the new direction will not go smoothly” [15]. Therefore, there are issues that require strengthening the institution of constitutional control and improving the mechanisms of its implementation. First of all, timely and effective implementation of the decisions of the Constitutional Court plays an important role in strengthening the position of the Constitutional Court of the Republic of Uzbekistan in the system of state power, ensuring the implementation of the principle of separation of powers.

Full support and implementation of the decisions of the Constitutional Court by the legislative bodies prevents the Constitutional Court from playing a positive legislative role. “Indeed, a legislator’s failure to comply with a constitutional court decision may call into question respect for fundamental human rights, as well as encourage the constitutional court

to act in a positive legislative role” [16].

Also, in our country, the Constitutional Court has not made any decisions on the inconsistencies to Constitution of a particular law or the decisions of the chambers of the Oliy Majlis. However, there is a specific practice of identifying inconsistencies in the code or inconsistencies in the law itself [18]. To resolve such inconsistencies, the Constitutional Court usually appeals to the Oliy Majlis in the form of a legislative initiative. Constitutional Court of Uzbekistan does not annul the law, appeals to the parliament. However, how the parliament deals with the decisions of the Constitutional Court is not highlighted in laws.

Among the CIS member states, only the legislation of the Russian Federation, Tajikistan and the Kyrgyz Republic provides for the right of legislative initiative of the highest judicial authorities. In Kyrgyzstan, the Constitutional Court does not have this right. At the same time, it should be noted that in these countries, the right of a court to initiate legislation is limited by its jurisdiction [19].

According to the law, The Constitutional Court has the right of legislative initiative. The right of legislative initiative of the Constitutional Court is exercised by submitting draft laws to the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan. The Constitutional Court appoints its representative to participate in the consideration of the draft law submitted by it in the Legislative Chamber.

However, the law makes it unclear that the Constitutional Court has the right to initiate legislation on matters within its competence or under any law.

The Constitutional Court of the Russian Federation has the right to initiate legislation on issues within its competence [20]. In this regard, the concept of "*within its competence*" also requires a separate interpretation [21, p. 32.]. Noting that the main criterion will be the issue of relevance and jurisdiction, P.Aitov noted that the grounds for refusal to accept the appeal for consideration by the Constitutional Court can be included in the criterion of relevance. Analysis of the documents adopted by the Constitutional Court of the Republic of Uzbekistan shows that the Constitutional Court has implemented a legislative initiative on the cases considered by it. In our opinion, it is expedient to reflect in the law a clear procedure for the implementation of this legislative initiative.

Another issue is gaps in law. They are an important object of constitutional judicial review. The problem of legal gaps has received significant attention within legal theory. Gaps in the law may occur because such a case was not taken into account when the law was created or because the case is a result of new social relations that emerged after the law was promulgated [22]. In the legislation of countries such as Russia, Belarus and Armenia, gaps in the law are listed as objects of constitutional control. The Constitutional Courts shall make a decision on the need to eliminate gaps in normative legal acts and their conflicts and legal uncertainties and send it to the relevant state body or official. The introduction in the legislation of Uzbekistan the power of the Constitutional Court to consider issues related to gaps in the law. The doctrine of separation of powers based on the principle of the rule of law, put forward by Montesquieu, has not lost its relevance today [23-25]. In conclusion it should be noted that the effective implementation of the decisions of Constitutional Court ensure the protection of the Constitution and balance among the state bodies.

Analyzing the issues, it can be concluded that: In Uzbekistan there are several issues, which researched and implemented in the future:

Firstly, the increasing role of The Constitutional Court of Republic of Uzbekistan;

secondly, the development of a clear mechanism for the implementation of legislative

initiatives by the Constitutional Court;

thirdly, the introduction of a procedure for reviewing gaps in the law; it will strengthen the position of the Constitutional Court in the system of separation of powers;

fourthly, to show the role of the decisions of The Constitutional court in the system of law sources and effective enforcement of them.

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