
RESEARCH ARTICLE

On the (in)compatibility of the Authentic Interpretation of the Law in Croatian Law with the Principles of Separation of Powers and Rule of Law: A View through the Prism of Constitutional Judicial Practice

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ABSTRACT

Bearing in mind that the Croatian Constitutional Court recently abolished the provisions on the authentic interpretation of the law, and considering the fact that it is a legal institute which raised a number of criticisms among the scientific and professional public and resulted in opposite positions of the Croatian Constitutional Court on the question of its constitutionality, the paper examines the issue of (in)compatibility of that legal institute with the constitutional principles of separation of powers and rule of law. To this end, the stated principles are examined by using relevant literature and constitutional judicial practice, while the practice of the Croatian Constitutional Court on (un)constitutionality of authentic interpretation is examined by considering the content of its decisions, with reference to certain examples from comparative constitutional judicial practice. It was concluded that giving an authentic interpretation, until its abolition, was in accordance with the principle of the separation of powers as long as such interpretation was not related to a specific court case and that it was in accordance with the principle of the rule of law as long as such an interpretation was not applied to those cases that had already become resolved.

KEYWORDS

Authentic interpretation, parliament, constitutional court, separation of powers, rule of law

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1. Introduction

After the Constitutional Court of the Republic of Croatia (2023) abolished the provisions of the Rules of Procedure of the Croatian Parliament (2013) on the authentic interpretation of laws, that legal institute with a long and rich history was removed from the Croatian law after more than 75 years since its introduction. The fundamental characteristics of that institute are as follows: a) it is an interpretation of one or more provisions of the law given by the legislator, b) it is considered as an integral part of the interpreted law, c) it has retroactive (*ex tunc*) effect, and d) it has binding effect for everyone (*erga omnes*) (Struić, 2016a).

Considering its fundamental characteristics, the authentic interpretation of the law raised a number of criticisms among the scientific and professional public, especially because of its retroactive effect, with the understanding that it violates the principle of the separation of powers because interpretations are inherent only to the judicial, not to the legislative power, and that the authority to provide an authentic interpretation is not contained in the Constitution of the Republic of Croatia (1990), but only in the parliamentary rules of procedure, etc. (e.g. Giunio, 2005; Antić, 2015; Struić 2016a).

Bearing in mind the importance of the authentic interpretation of the law that arises from its fundamental characteristics, as well as criticisms and opposite views on the constitutionality of the legal provisions on giving an authentic interpretation, the paper examines the issue of (in)compatibility of that institute with the constitutional principles of separation of powers and the rule of

law. There are numerous papers on authentic interpretation (e.g. Antić, 2015; Junio, 2005; Struić, 2016a, 2016b, 2018, 2019, 2021, 2022), which mainly concern the interpretation at the legal, constitutional (*supra*-legal) and the bylaw (*infra*-legal) level, the issue of public participation in the process of giving an authentic interpretation of the law etc. However, the analysis of the authentic interpretation of the law from the perspective of the constitutional principles of separation of powers and rule of law through the prism of constitutional judicial practice has not yet been the subject of research so far. Bearing that in mind, the paper examines whether that institute, until its abolition, was in accordance with the mentioned constitutional principles.

To this end, after the first introductory part of this paper, the second part examines the principles of separation of powers and rule of law using relevant literature and constitutional judicial practice available on the website of the Croatian Constitutional Court. After that, the third part examines the practice of the Croatian Constitutional Court on the issue of the constitutionality of authentic interpretation through the analysis of the content of its decisions, with reference to certain examples from comparative constitutional judicial practice. Finally, in the fourth part, concluding remarks are stated. It is expected that the results of this research will provide clear insights on the question of the authentic interpretation of the law from the perspective of the mentioned principles, as well as stimulate some further research on this issue.

2. Principles of separation of powers and rule of law

Although the first modern premises of the principle of separation of powers were found in the book *De Republica Anglorum: A Discourse on the Commonwealth of England* (1583), written by Sir Thomas Smith, through the idea of separation of powers between the people, the senate and the judiciary, as well as in the constitutional document of the Commonwealth of England, Scotland and Ireland entitled the Instrument of Government (1653), through the idea of separation of powers between the executive power and parliament, the most influential views on that principle were presented by John Locke in *Two Treatises of Government* (1690) and Charles-Louis de Secondat Montesquieu in *De L'Esprit des loix* (1748) (Bačić, 2002, p. 34). The concept of separation of powers – between legislative, executive, and judicial power – as propounded by Montesquieu, had a substantial impact, and it was incorporated into the first modern constitutional documents, starting with the Constitution of the United States of America (1787), and the Declaration of the Rights of Man and of the Citizen (1789). That concept had very different reflections, ranging from the rigid separation of power represented in the first written constitutions to the very mild separation represented in the later civil constitutions (Smerdel & Sokol, 2009). It is considered that the separation of power presented by Montesquieu did not tend towards a sharp and rigid organizational and active separation but towards cooperation and supervision of one authority over another in order to prevent or limit the possible abuse of power to the detriment of the freedom of citizens (Smerdel & Sokol, 2009, p. 330).

That is precisely the understanding of the separation of power that was accepted by the Croatian constitution-maker through the provision that the Croatian Parliament is the holder of legislative power (Article 71), while the executive power is exercised by the Government of the Republic of Croatia (Article 108), and the judicial power is exercised by the courts (Article 118 paragraph 1); their relationship rests on the principle of separation of powers, which “encompasses forms of mutual cooperation and reciprocal checks and balances” (Article 4 paragraph 2) of three equal powers. However, that in no way excludes the possibility of their mutual influence and does not guarantee their complete separation because all three powers interpenetrate each other through cooperation and supervision, preventing powers from being concentrated within only one authority.

The origins of the principle of the rule of law can be traced back to Aristotle around 350 BC, continuing with the works of theorists such as John Fortescue (1471), through Locke (1689) and Montesquieu (1748), to Albert Venn Dicey (1885), John Rawls (1971) and Joseph Raz (1977), encompassing formal and material aspects (Waldron, 2023). On the formal side, the procedural significance is emphasized, making it of great importance for the effective operation of the legal order, which is based on the principle of separation of powers and the requirement that human rights and fundamental freedoms can only be limited by law. Therefore, it is important for individuals to know the legal rules and procedures in advance to be able to harmonize their behavior with them, which would, thereby, become predictable, contributing to the greater safety of all members of society. On the material side, it is not only the form and procedure that are important but the values and goals that are to be achieved, keeping the rule of law at the center of a just society (Lauc, 2016, p. 51-52). Similar to the described concept, formed in the English constitutional doctrine of the 19th century, there is also a related concept of *Rechtsstaat* – formed in the German doctrine of the 19th century, which placed greater emphasis on the very nature of the state, hierarchy and respect for legal regulations, as opposed to an absolutist state that implies unlimited powers of the executive – and the doctrine of *l'Etat de droit*, developed at the beginning of the 20th century in France, which emphasizes less the nature of the state, and more the judicial evaluation of the constitutionality of legislation (Loughlin, 2010; Mecke, 2019; Venice Commission, 2010).

The Constitution of the Republic of Croatia in Article 3 *explicite* defines the rule of law as one of the highest values of the Croatian constitutional order and the basis for interpreting the Constitution, which, like laws, must have a specific content that includes and

respects the principle of separation of powers, the guarantee of fundamental human rights and freedoms, and the system of their protection before the authorities (Smerdel & Sokol, 2009). In that sense, the rule of law is visible through the constitutional provisions on the separation of powers (Article 4), the mandatory compliance of laws with the Constitution and other regulations with the Constitution and the law (Article 5 paragraph 1), the obligation to adhere to the Constitution and the law, and to respect the legal order (Article 5 paragraph 2), while the Constitutional Court is positioned as the constitutional guarantor of determining the content of the rule of law within the framework of its constitutionally entrusted tasks of monitoring the implementation and assessment of constitutionality and legality, protection of human rights and fundamental freedoms, etc. (Article 129).

The Constitutional Court of the Republic of Croatia (2000) established the fundamental meaning of the principle of separation of powers, pointing out that it is one of those rules of the organization of state power that are as important as they "serve the rule of law and defend it" and that it represents one of the elements of the rule of law because it "prevents the possibility of concentration of authority and political power (only) in one body". At the same time, the Constitutional Court emphasized that the separation of the three authorities "should not be interpreted mechanically, because all three state authorities are functionally intertwined and mutually permeated by a multitude of the most diverse relationships and mutual influences, with the predominant goal of mutual supervision".

The Constitutional Court of the Republic of Croatia (2000) also expressed the opinion that the rule of law, as the highest value of the constitutional order, includes the question of the general characteristics of the law. Namely, the rule of law "is not only the rule of law, but the rule by law which - in addition to the requirement for constitutionality and legality, as the most important principle of any regulated legal order - also contains supplementary requirements concerning the laws themselves and their content". In addition, the Constitutional Court pointed out that "in a legal order based on the rule of law, laws must be general and equal for everyone, and the legal consequences must be certain for those to whom the law will be applied" and "appropriate to the legitimate expectations of the parties in each specific case into which the law directly applies to them". Bearing that in mind, it is important to mention the position of the European Court of Human Rights (1994), which, in the case of the Greek refinery Stran and Stratis Andreadis v. Greece, emphasized the importance of the rule of law from the aspect of procedural equality of the parties, holding that the principle of the rule of law and the guarantee of a fair trial, expressed in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, "preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute". However, the authentic interpretation of the law, by its nature, is not intended to influence court decisions but rather to provide an interpretation of an unclear provision to determine its meaning.

3. Constitutional judicial practice

The paper analyzes the decisions of the Croatian Constitutional Court published on its website (<https://usud.hr/>) and highlights certain examples from comparative constitutional judicial practice by analyzing decisions of constitutional courts of other states published on that issue on their websites: the Republic of Italy (www.cortecostituzionale.it/), the Republic of North Macedonia (<https://ustavensud.mk/>), the Republic of Slovenia (<https://www.us-rs.si/>), and the Republic of Serbia (www.ustavni.sud.rs/).

The Constitutional Court of the Republic of Croatia (2004) expressed the opinion that the parliament's authority to give authentic interpretations of laws derives from its constitutional authority to pass laws and that the procedure for giving such interpretations must be governed by a legal norm, but "does not have to be the same as the procedure for passing laws". Furthermore, the Constitutional Court of the Republic of Croatia (2007) expressed the opinion that the parliament is the holder of legislative power, and this "implies that (...) it has, within the limits of the Constitution, the power to (...) determine which legislative acts and in what form it will pass", adding that the act of giving an authentic interpretation of the law is undoubtedly "a law in the full and true sense of the word". The claims that the provisions of the parliamentary rules of procedure violate the principle of separation of powers the Croatian Constitutional Court considered to be unfounded, with the explanation that "by its very nature, that institute is completely in accordance with the principle of separation of powers, regardless of the constitutional interpretation of that principle". In this regard, the Croatian Constitutional Court found that, when giving an authentic interpretation, the Croatian Parliament as a legislator interprets certain legal provisions in the abstract for all cases of the same type, while the court, when interpreting the law in application, interprets it individually, in relation to the resolution of a specific case. Therefore, the Constitutional Court established that these are "two completely different constitutional areas of exercise of power, so there is no question of the legislator 'entering' the area of judicial authority and thus limiting it" by authentically interpreting the law. Thus, it was determined that there is a clear compliance of the authentic interpretation of the law with the principle of separation of powers, which serves and defends the rule of law, and a clear compliance with the constitutional principle of independence of the judiciary, which is guaranteed by the principle of separation of powers.

From this aspect, in comparative constitutional judicial practice, the assessment of the Constitutional Court of the Republic of Italy (1994) is particularly interesting, which established that the parliament, as a legislative authority, is undoubtedly authorized to set rules "from the application of which effects may arise in terms of ongoing court proceedings", and this is especially so when its

intervention is dictated by the need to prevent a situation of irrational unequal treatment. Despite the fact that such an interpretive law necessarily affects the area of judicial authority, the Constitutional Court of the Republic of Italy (1957) concluded that the parliament "does not encroach on the principle of separation of powers", considering its action at the abstract level of normative sources and "indirect general influence on all judgments (...) without eliminating *potestas iudicandi*". Namely, if the parliament acted on an abstract level, without encroaching on the resolution of certain cases in the proceedings before the judicial authority, it is considered that it could neither encroach on the judicial authority (Constitutional Court of the Republic of Italy, 1997) nor violate the principle of separation of powers. In this sense, the Constitutional Court of the Republic of Italy (2007) unequivocally considers that giving norms a certain meaning does not lead to a violation of *potestas iudicandi* but only defines and delimits a particular normative case that is the subject of such *potestatis*. Similarly, it is important to mention the position of the Constitutional Court of the Republic of Serbia (2009), according to which from the fact that the authentic interpretation of the law gives only "the sense and meaning that the legislator had in mind when passing it", it follows that its giving does not encroach under the authority of the executive and judicial branches of government.

However, in the decision of the Constitutional Court of the Republic of Slovenia (2021), which abolished the provisions of the parliamentary rules of procedure on the authentic interpretation of the law, it was pointed out that it violates the principle of separation of powers because it allows the parliament to *ex post* influence the outcome of court proceedings and thereby encroaches on the constitutional powers of the judiciary and the executive authorities. At the same time, the Slovenian Constitutional Court did not accept the essential difference between the abstract interpretation of the legislator and the concrete interpretation of the courts, which shows that these are two completely different constitutional areas of exercise of power but found that the authentic interpretation generally affects court decisions in specific proceedings. Also, it did not accept the argument that the binding interpretation of normative provisions is not and cannot be part of the exclusive activity of the courts, but also of other bodies (e.g. state administration bodies, regulatory agencies, etc.), but concluded that, according to the Slovenian Constitution, the judicial power in the case dispute has the last word in the interpretation of the law.

Finally, focusing on the issue of the retroactivity of the authentic interpretation of the law and, therefore, on the issue of direct influence on concrete court proceedings in progress and the possibility of violating legal certainty that originates and rests on the clarity of the legal norms, which is implied by the principle of rule of law and right to a fair trial, the Constitutional Court of the Republic of Croatia (2007) took a clear position that the authentic interpretation cannot be applied to cases that were legally resolved before the entry into force of the legal act on the authentic interpretation of the law, but only to cases whose resolution is ongoing, or cases that will be resolved after the entry into force of the legal act on the authentic interpretation of the law. Moreover, such retroactive effect is apparent since it only determines which of the meanings should be given to the provisions of the law that is in force and does not have retroactive effect, so "such effect does not even have an act on its authentic interpretation" (Constitutional Court of the Republic of Croatia, 2007). Therefore, authentic interpretation of the law, until its abolition, was in line with the constitutional principle of the rule of law and the right to a fair trial as long as it was applied to current or future cases after the entry into force of the act on authentic interpretation.

A similar understanding of determining the meaning of an existing legal provision is present in the practice of the Constitutional Court of the Republic of North Macedonia (2013), while the Constitutional Court of the Republic of Italy (2002) developed a practice according to which the parliament can pass regulations with retroactive effect only when "retroactivity is adequately justified in the sense of reasonableness and does not contradict other values and interests protected by the Constitution", and it also refers to the retroactive effect of acts on authentic interpretation when it is adequately justified for the protection of "principles, rights and goods of constitutional importance" (Constitutional Court of the Republic of Italy, 2013).

Despite its earlier positions, the Constitutional Court of the Republic of Croatia (2023) abolished the provisions on the authentic interpretation of the law, referring to its own positions on the rule of law and the general characteristics of the law; to its views on the principle of separation of powers; to the constitutional principle of independence of the judiciary, the guarantee of which is the principle of the separation of powers, but also to the protection of the constitutional right to a fair trial, especially from the point of view of the unevenness of judicial practice, highlighting the position of the European Court of Human Rights in the case *Greece Stran Refinery and Stratis Andreadis v. Greece*. *Inter alia*, the Constitutional Court of the Republic of Croatia (2023) pointed out that this institute "imposes the interpretation of the legislator regardless of how the law has been interpreted and applied by the courts in the meantime (...) and whether the existing mechanisms for unifying judicial practice within the framework of the judicial authority were activated" which "may deprive the courts of their constitutional task, as well as responsibility" and the legislator, with his interpretation, "directly affects the concrete court proceedings in progress in which the courts should apply the law with an authentic interpretation". Also, the Croatian Constitutional Court considers that the authentic interpretation is given in the procedure without the necessary procedural guarantees for all political subjects and that its provisions are contained in the part of the parliamentary rules of procedure that regulates the procedure for adopting other acts and not the legislative procedure.

Due to all the stated reasons, and primarily due to the violation of the principle of separation of powers, the Constitutional Court expressed its opinion that the provisions on the authentic interpretation of the law are not in accordance with the Croatian Constitution.

4. Conclusion

The democratic imperative requires that no government body, including the Constitutional Court, should not be beyond the scope of constant critical review based on a reasoned analysis of its actions, regardless of whether the aforementioned criticism is presented by representatives of the scientific, professional or any other public, the Constitutional Court itself or some other authority (Struić, 2023). The Constitutional Court reconsidered its previous positions on the authentic interpretation of the law and took a significantly different legal position, although the comparative constitutional judicial practice (with the exception of the Slovenian Constitutional Court), as well as previously mentioned arguments, clearly show that the authentic interpretation of the law is generally in accordance with the constitutional principles of the separation of powers and rule of law.

Namely, the principle of separation of powers implies that all three branches of government (legislative, executive and judicial) interpenetrate each other through cooperation and supervision, preventing powers from being concentrated within just one of them. However, by giving an authentic interpretation of the law, the legislator did not concentrate his power of interpretation within the parliament because when giving an authentic interpretation of the law, the parliament interpreted certain norms abstractly for all similar cases, while the court gives a concrete interpretation of the law in order to resolve the specific case – so, it is only a question of two completely different constitutional areas exercise of state power. It follows that the authentic interpretation of the law, until its abolition, was in accordance with the principle of separation of powers as long as such interpretation was not related to a specific court case.

Regarding the relationship between the authentic interpretation of the law and the principle of the rule of law, especially from the perspective of possible direct influence on concrete court proceedings in progress and the possibility of violating legal certainty that originates and rests on the clarity of the legal norms, which is implied by the principle of rule of law and right to a fair trial, it should be reiterated that the parliament interpreted certain norms abstractly, for all similar cases, while the court gives a concrete interpretation of the law in order to resolve the specific case. Abstract interpretation cannot be applied to the cases that were legally resolved before the entry into force of the legal act on authentic interpretation of the law, but only to the cases whose resolution is in progress or will be resolved after the entry into force of the legal act on authentic interpretation of the law. Therefore, it can be concluded that giving an authentic interpretation until its abolition was also in accordance with the principle of the rule of law as long as it was applied to future and ongoing cases.

5- Study Limitations and Future Research

Although the previously mentioned questions open up space for some further research on this topic, such as a closer consideration of the possible influence of the decision of the Constitutional Court of the Republic of Slovenia (2021) on the abolition of the provisions of the parliamentary rules of procedure on the authentic interpretation of the law on the recent decision of the Constitutional Court of the Republic of Croatia (2023), with an identical outcome, such as well as other issues should be covered by some other, separate research.

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