

# CASE-LAW CONTRIBUTIONS TO CONSTITUTIONAL REVIEW'S DEVELOPMENT IN ROMANIA

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## Abstract

*To the Romanian system of law, jurisprudence does not have the quality of a formal source of law. Nevertheless, a legal reality, viewed from a historical perspective, has demonstrated the essential role of judicial practice in interpreting and enforcing the law, in constructing argumentative practices, in clarifying the will of the legislator, and in discovering the less obvious meanings of legal norms and, last but not least, in unifying thought and legal practice. Therefore jurisprudence, along with doctrine, is an important component of the Romanian system of law.*

*Based on these considerations, we intend to highlight some aspects of constitutional jurisprudence in this paper. We underline its contribution to the constitutional review of laws in Romania. Under the Constitution of 1866, which did not regulate institutionally such a control, the courts have assumed this competence by interpreting the law and by way of jurisprudence.*

*Important aspects of the Constitutional Court jurisprudence and of the courts in the development of constitutional review in our country are presented and analysed. We support the idea that jurisprudence currently plays an important part in the interpretation of constitutional norms, including with regard to deepening the constitutional review forms.*

**Keywords:** *The emergence of constitutional review in Romania / jurisprudential reasoning / the interpretation of the Constitution by case-law/ the role of jurisprudence in the calibration and development of constitutional review*

## 1. Introduction

Constitutional supremacy would remain just a theoretical matter if not for proper guarantees. Indisputably, constitutional justice and its particular form, constitutional review is the main guarantee of Constitution's supremacy, as is expressly stipulated by the Basic law of Romania.

Teacher Ion Deleanu believed: "*Constitutional justice may be deemed, alongside many other things, a paradigm of this century*"<sup>1</sup>. The emergence and evolution of constitutional justice is determined by several factors to which the doctrine refers; of these, we mention: man, as a citizen, becomes a cardinal axiological benchmark of civil and political society, and the fundamental rights and freedoms are no longer just a theoretical speech, but a normative reality as well; democracy is reconsidered, within the meaning that minority's protection becomes a key requirement of the rule of law and, at the same time, a counterweight to the principle of majority "parliamentary sovereignty" is submitted to the primacy of law and especially to the Constitution; as a consequence, the law is no longer an infallible act of Parliament, but conditional upon the Constitution's norms and values; last, but not least, reconsideration of the role and place of constitutions, within the meaning of qualifying them, especially as: "fundamental establishments of the governed, not of

the governing people, as a dynamic act, as a continues shaping and as an act of society"<sup>2</sup>.

The regulatory activity of law elaboration should continue by the activity of enforcing the rules; in order to enforce them, the first logical operation to carry out is to construe them.

Both the Constitution, and the law come as an assembly of legal rules, but these rules are expressed under the form of a legislative text. This is why it is not the legislative texts that constitute an object of interpretation, but the legal texts or the one of the Constitution. A legal text may comprise several legal rules. By way of interpretation, a constitutional rule can be deduced from a constitutional text. The Constitution text is drawn-up into general terms, which influences the determination degree of the constitutional rules. The constitutional rules are identified and determined via interpretation.

What also needs to be underlined is that a Constitution may comprise certain principles that are not clearly expressed *expressis verbis*, but they can be deduced by systematically interpreting other rules.

Within the meaning of the above, the speciality literature stated: "The determination degree of constitutional rules using the basic law text may justify the need for interpretation. The Rules in the Constitution are very suited for a progress of their course, because the text is par excellence imprecise, formulated into general terms. Constitution's formal

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<sup>1</sup> Ion Deleanu, *Justiția constituțională*, (Bucharest: Lumina Lex, 1995), 5.

<sup>2</sup> For more information, see Ion Deleanu, *op. cit.*, p. 5,6.

superiority, its rigidity prevent its review under very short time-spans and then the interpretation remains the only way to adopt the normative content, usually older, to the social reality which is permanently changing. As the meaning of constitutional rules is by their very nature of utmost generality, its precise determination depends on the interpreter's will<sup>3</sup>.

The scientific justification of the interpretation arises from the need to ensure the effectiveness of the rules comprised both by the Constitution, and by the laws via institutions mainly carrying out the activity of interpreting the rules provided by the author.

These institutions are first the courts of law, and the constitutional ones.

Checking compliance of a normative act with constitutional rules, institution which represents the constitutional review is not a formal comparison or mechanical juxtaposition of the two categories of rules, but a complex work relying on the interpretation techniques and procedures both of the law, and the Constitution.

Consequently, the need to construe the Constitution is a condition of applying it and securing its primacy. The constitutional review is essentially an activity of construing the Constitution, and the law. There need to be independent public authorities competent to construe the Constitution and to examine in this manner compliance of the law with the Constitution. These authorities are the Courts and the Constitutional Courts within the European template of constitutional justice.

## 2. Content

Evaluation of the constitutionality of the laws is the constitutional justice's main form and it is the basis for democracy, guaranteeing a democratic government is to be accomplished, complying with the Constitutional and law supremacy.

George Alexianu thinks legality is an attribute of modern state. The idea of lawfulness in the author's conception is formulated as follows: all state bodies operate based on a rule of law decided by the lawmaker, which needs to be complied with.

When referring to the Constitutional supremacy, the same author claimed with full justification and in relation to today's realities: "When modern state organizes its new look, the first idea with which it is preoccupied is to crack down the administrative abuse; hence the intervention of constitutions and jurisdictionally, the establishment of an examination of legality. Once this abuse established, another one arises, much more serious, that of Parliament.

Constitution's supremacy is then invented and various systems to guarantee it. The idea of legality thus acquires a strong strengthening leverage<sup>4</sup>.

An important aspect is also that of defining the notion of evaluation of the constitutionality of the laws. The legal doctrine<sup>5</sup> has underlined that this duty's problematic should be included in the principle of legality. Legality is a fundamental principle for the organization and operation of the social and political systems. This principle has several coordinates: existence of a hierarchized legal system, on top of which lies the Constitution. Consequently, the ordinary law should be compliant with the Constitution in order to meet the legality condition; State's bodies should carry out their duties by strictly complying with the competency set out by law; normative acts' drafting should be made by competent persons, by a predetermined procedure, complying with the provisions of the superior normative acts with legal force and by complying with the law and the Constitution by all State bodies.

The doctrine has defined constitutional review as: "Organized activity of checking the conformity of the law with the constitution and from the point of view of the constitutional right, it comprises rules about the competent authorities making this check, the procedure to follow and the measures which can be taken after this procedure has been fulfilled"<sup>6</sup>.

It follows, from the definition's examination that the constitutional review has a complex meaning. This is an institution of the constitutional law, i.e. the assembly of legal norms on the organization and operation of the competent authority of exercising control, as well as the assembly of legal norms with procedural character, which regulate and may be ordered by a constitutional court.

At the same time, there is also an organized activity whereby Constitutional supremacy is guaranteed, as compliance of the norms comprised by laws and other normative acts with constitutional regulations.

Essentially, constitutional review supposes checking compliance of the law as a legal act of Parliament, but also of other categories of normative acts with the rules comprised by the Constitution. Compliance should exist both in terms of a formal aspect (competency of the issuing body and the drafting procedure), as well as from a material standpoint (content of the norm in the ordinary law should be compliant with the constitutional requirements).

Historically, the judicial review of constitutionality established in the U.S.A. in the beginning of the 19<sup>th</sup> century holds particular

<sup>3</sup> Ioan Muraru, Mihai Constantinescu, Elena Simina Tănăsescu, Marian Enache, Gheorghe Iancu, *Interpretarea Constituției. Doctrină și practică* (Bucharest: Lumina Lex, 2002), 67.

<sup>4</sup> George Alexianu, *Drept constituțional*. (Bucharest: Casei Școalelor, 1930), 71.

<sup>5</sup> See, in that regard, Ion Deleanu, *Instituții și proceduri constituționale*, (Bucharest: C.H.Beck, 2006), 810; Ioan Muraru, Elena Simina Tănăsescu, *Drept constituțional și instituții politice*, Vol. II, (Bucharest: C.H.Beck, 2014), 191; Marius Andreescu, Andra Puran, *Drept constituțional. Teoria generală a statului*, 2nd edition, (Bucharest: C.H. Beck, 2017), 205-206.

<sup>6</sup> Muraru and Tănăsescu, *op.cit.*, 191.

importance, although the Constitution does not regulate procedural rules.

The Supreme Court ruled on the case of *Marbury v. Madison* for the first time in a case of this nature, declaring the Federal Constitution as a supreme law of the state and removing an act of Congress contrary to the Federal Constitution. The Court's decision is drawn-up by Judge John Marshall and is the basis on which the American case-law is founded in the matter of constitutional review.

The rationale that the American judge employed was as follows: the judge should enforce and construe laws. Constitution is the supreme law of a state which should be enforced with priority towards any other law. As Constitution is a law, it shall be construed and enforced by the judge, including to a particular case being the subject matter referred for trial. If the law is not compliant with the constitutional rules, the latter shall be enforced given the Constitution's supreme character.

The European template of constitutional justice is characterized from an institutional point of view in constitutional courts or district courts. During the inter-war period, this template was noticed in: Austria (1920), Czechoslovakia (1979), Spain (1931) and Ireland (1938).

In our country, constitutional review has evolved, being marked by the national particularities and successive application of the two templates presented above.

The Constitution from 1866 did not regulate the constitutional review. However, the provisions of Art. 9 of the Constitution may be mentioned, according to which the Lord "punishes and promulgates the laws" and that He "can refuse its punishment". Consequently, the head of State could refuse to promulgate a law if they believed it to be unconstitutional. Obviously, this wasn't exactly an evaluation of the constitutionality of the laws, but it is a precursor means to such a check. During the period in which the Constitution of 1866 was in force, the head of State never resorted to such a procedure.

The constitutional review made by a court of law, not by a specialized institution, different from the judicial power, was accepted on the European continent as well. The constitutional history mentions a Romanian priority in this case. Thus, during the period 1911/1912, first Ilfov County Court, then the High Court of Cassation and Justice extended their powers to check the constitutional compliance of laws in the dispute known as "the tramway matter" from Bucharest.

What is interesting is that the rationale employed by Ilfov County Court and by the High Court of Cassation and Justice in arguing the possibility to achieve, using a pretorian way, constitutional review. Essentially, the considerations were the following: 1) the Court did not assume competency *ex officio* to rule

on the constitutionality of a law and to cancel it, since such procedure would have constituted a mixture of the judicial power in the law making powers' duties. Consequently, the court undertook this competency, since it had been referred to check the constitutionality of a law; 2) based on the duties given, judicial power's main mission is to construe and enforce all the laws, either ordinary or constitutional. If an invoked law contravenes the Constitution, the court may not refuse to settle the matter; 3) There is no provision in the Constitution of 1866 by which to expressly prohibit the judicial power's right to check whether a law is compliant or not with the Constitution. The provisions of Art. 77 of the Constitution are invoked; according to them, a judge, as per the oath taken, is under the obligation to enforce the laws and the country's Constitution; 4). Unlike ordinary laws, the Constitution is permanent and it can only be revised as an exceptional measure. As it is the supreme force law, Constitution is imposed by its authority on everybody and this is why the judge is obligated to enforce it with priority, including in the hypothesis where the law based on which the dispute is settled is contrary to the Constitution<sup>7</sup>.

Decisions ruled by Ilfov County Court and by the High Court of Cassation and Justice have been well received by the specialists of that time. Here is a brief comment: "This decision was a great satisfaction to all the people of law. It is a big step in the advancement of this country toward progress, for it enshrines the principle that this country's Constitution, its foundation, the palladium of our rights and freedoms, and no one should disobey them. We are proud our justice is showing even to the justice in the Western countries what is the true path to progress in the matter of public law"<sup>8</sup>.

In exercising its duties, the Constitutional Court regulates a work of interpreting the law and the Constitution. The constitutional court cannot amend, complete or repeal a law.

In its former drafting, before the Constitution's review, Law no. 47/1992 prohibited the Constitutional Court to construe those normative acts making the subject matter of the constitutional review. Naturally, the current regulation has removed this ban, since the activity of checking compliance of the normative regulations with the provisions of the Constitution the constitutional judge carries out is essentially a work of enforcing the law relying on the interpretation of the legal rules.

The Constitutional Court participates in the fulfilment of the legislative function in the State, but not as a positive lawmaker, but as a negative lawmaker, whose purpose is to remove the "unconstitutionality venom" from a normative act. This is why the Court, by its duties, is not subrogated to the Parliament's activity, since the amendment, completion or repealing of a law is an exclusive attribute of the Parliament.

<sup>7</sup> See *Curierul Judiciar*, No. 32 (29 April 1912): 373-376.

<sup>8</sup> N.D.Comşa, Notes from *Curierul Judiciar*, No. 32 (29 April 1912): 378.

The Constitutional Court's constructive interpretation by case-law of the Basic Law also arises from this institution's role to "support the good operation of public powers in the constitutional reports of separation, balance and mutual control". The principle of separation and balance of powers in the State is still, despite all the critiques some authors expressed, the fundament of democratic exercise of state power and the main constitutional guarantee of avoiding excess or abuse of power from any of the State's authorities.

The relationships between State's authorities are complex in nature, but they must also secure their proper operation, by complying with the principle of Constitution's legality and supremacy. To carry out this desideratum, it is very important that a state balance is maintained between all its forms and variants, including as social balance.

The separation and balance of powers no longer concerns just the classical powers (legislative, executive and judicial). Other powers are added to these, rendering new dimensions to this classical principle. The relationships between the participants in the state and social life can also cause conflicts which need to be settled in order to preserve the balance of powers. Some constitutions refer to disputes of public law (Constitution of Germany- Art. 93), to conflicts of jurisdiction between the State and autonomous communities or conflicts of duties between the State's powers, between the State and regions and between regions (Constitution of Italy – Art. 314).

Romania's Constitution speaks of judicial conflicts of constitutional nature between the public authorities [Art. 146 sub-par. c)] and regulates the mediation function between State powers that the President exercises.

The Constitutional Court is an important guarantor of the separation and balance of the State's powers, since it settles legal conflicts of constitutional nature between public authorities and by the duties it has in the matter of control of constitutionality prior to laws and checking constitutionality of regulations of chambers, it intervenes in ensuring balance between the parliamentary majority and minority, effectively ensuring the opposition's right to express itself.

The Constitutional Court is a guarantor that the fundamental freedoms and rights are complied with. This fundamental part the constitutional court plays in the rule of law is accomplished by interpreting Constitution's case-law and of the laws. As a general rule, there are three key guarantees from a constitutional point of view on the rights and freedoms of citizens established by the Constitution:

Constitutional supremacy; b) Constitution's rigid character; c) citizens 'access to the constitutional

review and to the control of legality for the acts subordinated to law.

In Romania, the procedure of the exception of unconstitutionality ensures citizens 'indirect access to the constitutional justice.

Our constitutional court's case-law brings its contribution to the constitutional review in Romania by several aspects. We would like to analyse some relevant decisions in this matter next.

The Constitutional court has construed the notion of "law" in order to determine the scope of competency of the constitutional review on normative acts. The case-law has mentioned that the term of "law" provided under Art. 146 sub-par. b) of the Constitution is not widely used consisting of all normative acts, but only in its strict meaning, of law, by which the normative act is understood, adopted by the Parliament and promulgated by the President of Romania. At the same time, this scope also includes ordinances which are normative acts adopted by the Government based on a legislative delegation. "The concept of law arises from the combination of the formal criterion to the material one, since the content of law is determined by the importance paid by the lawmaker to the regulated aspects...settlement of the exception of unconstitutionality concerning other normative acts is not of the Constitutional Court's competency, as these acts are controlled in terms of legality by the administrative disputes courts"<sup>9</sup>. This decision of the Constitutional Court is important, particularly because it follows that the courts, particularly the administrative disputes ones, in relation to the legal rules of competency, may check the legality of a normative act, including in terms of its constitutionality.

The Court has determined that its role is to set out that the provisions of law criticised are constitutional and, at the same time, if the interpretation given to them abides by the Constitution's requirements, as such that, to the extent the legal text criticised may be conferred a constitutional interpretation, the Court shall find the legal provision's constitutionality in this interpretation and shall exclude any other possible interpretations from this application<sup>10</sup>. This solution of our constitutional court is important because it identifies, from a constitutional point of view, the so-called interpretative decisions of the Court, by which the legal text criticised for unconstitutionality is not removed, but interpreted within the meaning of the constitutional rules to produce legal effects.

The Constitutional Court has constantly, in its case-law, decided that it does not have the competency to control facts materialized into actions or inactions, but only the "extrinsic and intrinsic conformity of the normative act adopted with the Constitution"<sup>11</sup> in connection with the scope of the Constitutional Court's competency to exercise constitutional review *a priori*

<sup>9</sup> Decision no. 435 of 13 September 2005, published in the Official Journal no.924 of 17 October 2005.

<sup>10</sup> Decision no. 223 of 13 March 2012, published in the Official Journal no.256 of 18 April 2012; Decision no. 448 of 29 October 2013, published in the Official Journal no .5 of 7 January 2014.

<sup>11</sup> Decision no. 1237 of 6 October 2010, published in the Official Journal no.785 of 24 November 2010.

on the laws, especially if the constitutionality check is required by a normative act amending a law whereby it was decided by the case-law that “In accordance with Art. 146 sub-par. a) of the Constitution, the a priori constitutional review is exercised by the Constitutional Court only on the laws before they are promulgated, not on the provisions of laws in force. Irrespective of the connections that can be made between the amending text and the amended text, the Constitutional Court, on grounds of Art. 146 sub-par. a) of the Constitution, cannot make a ruling within the a priori control over the law-amending text to be submitted to promulgation and it cannot expand constitutional review over the amended text from a law in force”<sup>12</sup>.

Decision no. 799 of 17 June 2011 made by the Constitutional Court is important, because it established competency of this court of ruling over the constitutionality of the review law, adopted by the parliament before being subjected to referendum. In this regard, it decided that: “The review law adopted by the Parliament needs to be submitted to referendum, under the conditions of Art. 151 par. 3 of the Basic Law to be examined by the Constitutional Court to find out, on the one hand, whether the Court’s decision on the law draft or proposal for review of the Constitution was respected or not and, on the other hand, whether the changes and completions made to the draft or proposal for review in the procedure for parliamentary debate and adoption complies with the constitutional provisions concerning the review.”<sup>13</sup>.

More decisions have been ruled by our constitutional court in connection with the determination of its competency of ruling on the constitutionality of decisions made by the Parliament. In this regard, we refer to an important matter arising from the case-law in connection with the scope of constitutional review in this matter. In this regard, the Constitutional Court has constantly ruled that only decisions made by the Parliament can be subjected to the constitutional review, adopted after this competency has been conferred by the lawmaker, affecting constitutional values, rules and principles or, as applicable, the organization and operation of authorities and institutions with a constitutional rank.<sup>14</sup>.

At the same time, the Constitutional Court stated that the task of controlling the decisions made by the Parliament “is an expression of the Rule of Law’s requirements and a guarantee of the fundamental rights and freedoms... lack of jurisdiction control is equal to

a transformation of the parliamentary majority into judges of own acts”<sup>15</sup>. In the same regard, it was claimed that accepting the contrary thesis, leading to the exclusion of the exercise of constitutional review of the decisions made by the Parliament, made by violating the express provisions of the law, would lead to the placement of the supreme representative body of the people- the Parliament- above the law and accepting the idea that it is precisely the authority which legitimately adopts the laws constitutionally may breach them without any sort of punishment.<sup>16</sup>

One of the most important problems to have made the object of analysis by the Constitutional Court refers to the competency of this court of ruling on the conformity of a normative act with a legal act of the European Union institutions. In this regard, the case-law has constantly stated that the constitutional court has no competency to carry out a conformity control between a directive and the national normative act whereby it is transposed. A potential non-conformity of the national act to the European one does not implicitly draw the unconstitutionality of the national act of transposition. The competency of conferring greater protection in the national law towards the legal instruments of the European Union devolves on the lawmaker.<sup>17</sup>

In connection with the constitutionality check of the decisions ruled by the High Court of Cassation and Justice in settling appeals in the interest of the law, the Constitutional Court has ruled in its case-law that according to the legal rules in force, it has not such competency<sup>18</sup>). However, if, by a decision ruled in an appeal for the interest of the law, a legal text is given a certain interpretation, it cannot exclude the competency of the Constitutional Court of analysing the respective text, in the interpretation given by the court of last instance. “From the perspective of relating to the Constitution’s provisions, the Constitutional Court checks the constitutionality of the applicable legal texts, in the interpretation enshrined in the interest of the law. Admitting a contrary thesis contravenes to reason of existence itself of the Constitutional Court, which would deny its constitutional role, accepting that a legal text is applied under the limits which would collide with the Basic Law<sup>19</sup>.”

The case-law has established that the constitutional disputes court may rule in connection with the constitutionality of a repealing rule, seeing as, on the one hand, the presumption of constitutionality of

<sup>12</sup> Decision no. 498 of 8 June 2006, published in the Official Journal no.554 of 27 June 2006.

<sup>13</sup> Decision no. 799 of 17 June 2011 on the law draft concerning the review of Romania’s constitution published in the Official Journal no.440 of 23 June 2011.

<sup>14</sup> Decision no. 53 of 25 January 2011, published in the Official Journal no.90 of 3 February 2011. See also : Decision no. 54 of 25 January 2011, published in the Official Journal no.90 of 3 February 2011; Decision no. 307 of 28 March 2012, published in M.Of.no.293 of 4 May 2012; Decision no. 783 of 26 September 2012, published the Official Journal no.684 of 3 October 2012.

<sup>15</sup> Decision no. 727 of 9 July 2012, published in the Official Journal no.477 of 12 July 2012; Decision no. 80 of 16 February 2014, published the Official Journal no. 246 of 7 April 2014.

<sup>16</sup> Decision no. 251 of 30 April 2014, published in the Official Journal 376 of 21 May 2014.

<sup>17</sup> Decision no. 415 of 7 April 2011, published the Official Journal no.471 of 5 July 2011.

<sup>18</sup> Decision no. 778 of 16 June 2011, published the Official Journal no.668 of 20 September 2011.

<sup>19</sup> Decision no. 854 of 23 June 2011, published the Official Journal no.672 of 21 September 2011.

the law is a relative presumption and, on the other hand, the provisions of Law no. 24/2000 lay down that it is impossible to reinstate the initial normative act by repealing of an prior repealing act.<sup>20</sup>

With regard to the competency of the Constitutional Court of settling legal disputes of constitutional nature, several relevant decisions have been ruled.

A first aspect is the definition given by the Constitutional Court to the legal dispute of constitutional nature: "The legal conflict of constitutional nature implies specific acts or actions whereby one or more authorities assign themselves powers, duties or competencies which, according to the Constitution, belong to other public authorities or the omission of public authorities, consisting in the declination of their jurisdiction or refusal to carry out certain acts falling within their obligations". Consequently, according to the court's case-law, legal disputes of constitutional nature are not limited to just disputes of positive or negative jurisdiction, which could create institutional blockages, but aim at any conflicting legal situations whose occurrence reside directly in the Constitution's text.<sup>21</sup>

The case-law has set out that political parties, public persons of public law are not in the category of public authorities that are susceptible of being parties involved in a legal dispute of constitutional nature which, according to the provisions of Art. 8 par. 2 of the Basic Law, contributes to the definition and expressing of the public will of the citizens. Hence, it is the Constitutional Court's opinion that political parties are not public authorities. Also, parliamentary groups as well are not public authorities, but structures of the chambers of Parliament. "A potential conflict between a political party or a parliamentary group and a public authority does not fall within the category of conflicts that can be settled under the jurisdiction of the Constitutional Court, as per Art. 146 sub-par. a) of the Constitution".<sup>22</sup>

By the same decision, the Constitutional Court ruled that opinions, judgments of value or allegations of a public dignity mandate holder- as is the President of Romania, or the leader of a public authority- concerning other public authorities cannot, by themselves, constitute legal disputes between public authorities, because they cannot trigger institutional blockages, if not followed by actions or inactions which may prevent these public authorities from carrying out their constitutional tasks.

**Judicial review** is an important way to guarantee the Basic Law's supremacy, since the courts, by the nature of their duties, they construe and enforce the law, which also implies the obligation to analyse compliance of the legal acts subjected to judicial review with the Constitution's rules. Consequently, the courts have competency in the matter of constitutional justice.

We are taking into consideration not only the general obligation of the judge to comply with and enforce the Constitution rules or the duties conferred by law to refer the constitutional court by an exception of unconstitutionality, but particularly the possibility to censure a legal act in terms of constitutionality.

Recent case-law and doctrine in the matter look into the competency of the courts to check some legal acts in terms of compliance with the constitutional rules. An unconstitutional legal act is an act issued with misuse of power.

The unconstitutionality of a legal act may be ascertained by a court if the following conditions are cumulatively met:

1. the court exercises its duties within the limits of the competency set out by law;
2. the legal act may be individual or normative; it may be binding or elective;
3. not to have to the case the exclusive jurisdiction of the Constitutional Court to rule over the constitutionality of a legal act;
4. settlement of the case should depend on the legal act being criticized for its unconstitutionality;
5. there is a pertinent, sufficient and reasonable motivation of the court on the legal act's unconstitutionality.

If these conditions are cumulatively met, the boundaries of the courts' duties are not exceeded, but on the contrary, the principle of the Constitutional primacy applies and effectiveness is given to the judge's role of applying and interpreting the law correctly. Such a solution is justified in relation to the judge's role in the rule of law as well: to construe and enforce the law.

Fulfilment of this constitutional mission, particularly important and difficult at the same time, requires the judge to enforce the law by complying with the principle of Constitutional primacy; consequently, to evaluate the constitutionality of legal acts forming the object of the dispute referred for trial or which apply to the settlement of the case. Enforcement of the legal acts is made by the judge taking account of their legal force, by complying with the principle of Constitutional primacy. In this regard, the provisions of Art. 4 par. (1) of Law no. 303/2004 also need to be mentioned, which force the magistrates to ensure the supremacy of law through their entire activity.

Another problem is that of knowing what are the solutions that the courts can rule, by complying with the conditions shown above, where they find the unconstitutionality of a legal act. There can be two situations: In a *first hypothesis*, the courts can be directly vested with checking the legality of a legal act, as is the case of the courts of administrative disputes. In this case, the courts can find by making a decision, the absolute nullity of legal acts, on grounds of

<sup>20</sup> Decision no. 20 of 2 February 2000, published the Official Journal no.72 of 18 February 2000.

<sup>21</sup> Decision no. 901 of 17 June 2009, published the Official Journal no. 503 of 21 July 2009.

<sup>22</sup> Decision no. 53 of 28 January 2005, published the Official Journal no. 144 of 17 February 2005.

unconstitutionality. *The other situation* takes into consideration the hypothesis in which the courts are not vested directly with checking the legal act criticised for unconstitutionality, but that legal act applies for settling the case referred for trial. In this case, the courts can no longer order the cancellation of the unconstitutional legal act; however, they shall no longer enforce it to settle the case.

### 3. Conclusions

In our opinion, the Constitutional Court's role as a guarantor of the Basic Law should be enhanced by new duties aiming at limiting the excess of power of the State's authorities. We do not agree to what the specialty literature states, i.e. that a potential improvement of constitutional justice could be achieved by reducing the constitutional disputes court's duties<sup>23</sup>. It is true that the Constitutional Court ruled some questionable decisions in terms of abiding by the limits of exercising the duties incumbent upon it under the Constitution, by undertaking the positive lawmaker role.<sup>24</sup> Reduction of the duties of the constitutional court for this reason is not a solution as legal basis. Surely, reducing the duties of a state authority leads to the removal of the risk of faultily exercising such duties. This is not how the activity of a state authority is improved in a rule of law, but by searching for legal solutions of carry out the duties which turn out to be necessary to the state and social system under better conditions.

Proportionality is a fundamental principle of the law explicitly enshrined by constitutional, legislative regulations and international legal tools. It is based on the values of the rational law of justice and equity and it expresses the existence of a balanced or suitable relationship between actions, situations, phenomena; it is a criterion for limiting the measures set out by the state authorities to what is necessary to reach a legitimate goal, this way guaranteeing the fundamental rights and avoiding the abuse of power by the state's authorities. Proportionality is a basic principle of the European Union's law, being expressly enshrined by the provisions of Art. 5 of the Treaty on the European Union<sup>25</sup>.

We estimate that this principle's express regulation just in the contents of the provisions of Art. 5 of the Constitution, applied in the field of narrowing the exercise of rights is insufficient to emphasize the

principle's entire meaning and significance for the rule of law.

In a future review of the basic law, it would be useful to add another paragraph at Art. 1 of the Constitution, foreseeing that "*The exercise of State power should be proportional and non-discriminating*". This new constitutional regulation would become a genuine constitutional obligation for all State authorities, and they would exercise their duties as such that the measures adopted would register within the limits of the discretionary power recognized by law. At the same time, the possibility is created for the Constitutional Court to penalize the abuse of power in the Parliament and Government's activities, via the constitutional review of laws and ordinances, using the principle of proportionality as a criterion.

Among the Constitutional Court's duties can be included the one of ruling on the constitutionality of those administrative acts exempted from the legality control of the administrative disputes court. This category of administrative acts, to which Art. 126 par. 6 of the Constitution refers, along with the provisions of Law no. 544/2004 of administrative-disputes are particularly important to the whole social and state system. Consequently, constitutionality review is necessary since, in lack thereof, discretionary power of the issuing administrative authority is limitless and it may lead to the excessive narrowing of the exercise of the fundamental rights and freedoms or to the breach of important constitutional values. Our constitutional court should, for the same arguments, be able to review the President's decrees instituting the proceedings of referendum, in terms of their constitutionality.

The High Court of Cassation of Justice has the competency to adopt decisions in the appeal procedure for the interest of the law, which are binding for courts. If there is no legality or constitutionality control, practice has demonstrated that the court of last resort has, in numerous situations, exceeded its duty of construing the law and, by such decisions, has amended or completed normative acts, acting like a genuine lawmaker, thus violating the principle of separation of powers in the State<sup>26</sup>. We believe that, under these circumstances, the Constitutional Court must be given the competency to rule on the constitutionality of the decisions made by the High Court of Cassation and Justice adopted in the appeal proceedings for the interest of the law, in order to avoid the abuse of power from the court of last instance.

<sup>23</sup> Genevevia Vrabie, "Natura juridică a curților constituționale și locul lor în sistemul autorităților publice", in *Revista de Drept Public*, no. 1 (2010): 33.

<sup>24</sup> As an example, we refer here to the Decision no. 356/2007, published the Official Journal no. 322 of 14 May 2007 and to the Decision no. 98/2008 published the Official Journal no. 140 of 22 February 2008.

<sup>25</sup> For more information, see Marius Andreescu, "Proportionalitatea, principiu al dreptului Uniunii Europene" in *Curierul Judiciar* no. 10 (2010): 593-598.

<sup>26</sup> For more information, see Andreescu Marius, „Constituționalitatea recursului în interesul legii și ale deciziilor pronunțate”, in *Curierul Judiciar* no. 1 (2011): 32-36.

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