THE ACTION IN TIME OF THE CONSTITUTIONAL COURTS' DECISIONS

VALENTINA BĂRBĂȚEANU[*]

Abstract
The effects of the decisions of the constitutional jurisdictions may sometime disturb the balance of the normative system. This is the reason why, in different countries, the constitutional courts have modulated in time the impact of their decisions. In some cases, they are postponing the effects of their decisions (e.g. Italy) or they are establishing a precise moment in time up until the legislative power has the duty to change the normative provision declared inconsistent with the Basic Law (e.g. Germany, Austria). In other cases, they point out the way their decisions affect different juridical situations (e.g. Romania). This study intends to analyze the action in time of the decisions of some European constitutional jurisdiction.

Keywords: *Constitutional review, constitutional jurisdictions, effects of the decisions, action in time, retroactivity (retrospective laws).*

1. Introduction

The normative system of every state is influenced by a multitude of elements. One of them consists in the effect of the decisions rendered by the authorities of constitutional review. They have the main power to check the compatibility of various normative acts with the provisions and principles enshrined in the Basic Laws. Whenever they detect a deviation from the observance and the respect owed to the constitutional values, they sanction the respective normative act by eliminating it from the legal order.

Each state has provided a specific mechanism in this regard. Usually, the annulment takes its effects as from the day the decision is officially published. In some other cases, the Basic laws have established an interval of time that has to flow until the annulment starts producing its effect. There are also several constitutional jurisdictions that are entitled to determine by themselves this moment in time. In this manner, the annulment is postponed and the effects of the unconstitutional normative act are prolonged even after the declaration of its unconstitutionality. The authorities of constitutional review can also impose to the legislative power a term within which it has to adopt a new regulation.

This issue made the object of some studies[1] and also was briefly taken into discussion, among many other major topics, on the occasion of the XV[th] Congress of the Conference of European Constitutional Courts[2]. However, a comparative view of the way some of the most representative authorities of constitutional justice are dealing with the entrance into force of their annulment decisions may be helpful for understanding the benefits or the shortcoming of the diverse mechanisms chosen by the national legislators.

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[*] PhD candidate, research assistant, Faculty of Law, "Nicolae Titulescu" University of Bucharest (valentina_barbateanu@yahoo.com).

[1] See, for instance, referring to the Belgian case, Geraldine Rousoux, „Le maintien des «effets» des dispositions annulées par la Cour d'arbitrage : théorie et pratique", *Liber Amicorum P. Martens*, (Bruxelles: Larcier, 2007).

[2] Organized by the Constitutional Court of Romania and held in Bucharest, on 23th-25th of May 2011, with the theme „Constitutional Justice: Functions And Relationship With The Other Public Authorities". All the national reports, along with the General Report, were published in the book of the Congress: *Justiția constituțională. Funcții şi raporturi cu celelalte autorități publice – Drept constituțional comparat*, (Bucureşti: Universul Juridic, 2012).

2. General considerations regarding the constitutional review of normative acts

The constitutional review of normative acts is an essential dimension of the States which are governed by the rule of law. Its purpose is to ensure and grant the supremacy of the Constitution as basic, fundamental law of the State, placed on the very top of the normative hierarchy established within the juridical system of the State[3]. This task was entrusted by the legislative power to different authorities of constitutional review which were created in most countries. These authorities reveal their contribution in defending the democratic values enshrined in the constitutional provisions and they help increasing the level of protection offered by the Basic laws to human rights and freedoms.

The supremacy of the constitutional norms over the entire normative ensemble is the central idea that triggers the mechanism of constitutional review. The acknowledgement of the prevalence of the Basic law over every normative act represented a dramatic evolution towards authentic democracy[4]. The constitutional justice has gained its position when the absolute sovereignty of the Parliament has been balanced and confined to the requirements imposed by the Basic laws regulations[5].

The constitutional review is performed in the so-called 'European model' by special authorities that are empowered by the constitutional legislator itself to ensure the constitutional review. They are usually especially created authorities, independent and separated of any other public authority, which are not subject to any influence coming from any of the state's branches of power – nor the legislative, the executive or judicial authority[6]. They can be called 'constitutional council', like in France, or 'constitutional court', as it is in Germany, Austria or Romania or 'constitutional tribunal', as Spain has, for instance. They can also be the highest courts in the judicial hierarchy in the state, situation met in Estonia or Greece. In all these cases the review is 'centralized' or 'concentrated'. On the contrary, the 'American model'[7] is characterized by a 'diffuse' judicial review, fulfilled by every ordinary court whenever it is confronted with an alleged un-constitutionality of a legal provision which may determine the result of the judicial trial[8].

Regardless of their appellation and the classifications offered by the scholars, the fore-mentioned authorities have the main prerogative to check whether the lower level norms comply with the provisions of the Basic laws of each respective State. The authorities of constitutional review have consolidated over the time their role of grantors of the supremacy of the Basic law, becoming essential pillars of the primacy of law in the democratic States.

Their functions, regulated and assigned by the Basic laws and specific normative acts, vary from one state to another, due to the different historical circumstances and ideological tendencies that have marked out their creation.

There are two important categories of constitutional review that one can meet in most countries endowed with such a review. There is the **preventive constitutional review**, which is also

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[3] According to Hans Kelsen, the reason of validity of every legal norm resides in a so-called *Grundnorm*, which is a hypothetical fundamental norm considered to be the foundation of the entire legal system. See Hans Kelsen, *Doctrina pură a dreptului*, (Bucureşti: Humanitas, 2000), 272.

[4] For theoretical and historical details regarding the developing of the constitutional supremacy, see Ioan Deleanu, *Instituţii şi proceduri constituţionale în dreptul român şi în dreptul comparat*, (Bucharest: C.H. Beck, 2006), 227-257.

[5] In the context of the amendment of the French Constitution in 2008, with the aftermath of the consecration of the *a posteriori* review of constitutionality of the statutes which are already in force, professor Guillame Tusseau noted that that moment represented the end of what have been called the ‚rousseauist legicentrism' that governed the French legal order for a very long time. See Guillame Tusseau, „La fin d'une exception française ?", *Pouvoirs* 137 (2011), 5.

[6] Louis Favoreu, *Les cours constitutionnelles*, coll. „Que sais-je?", la 2eme edition, (Paris: Press Universitaires de France, 1992), 3.

[7] Florin Bucur Vasilescu, *Constituţionalitate şi constituţionalism*, (Bucureşti: Naţional, 1997), 40-42.

[8] The so-called 'American model' has been invented in the United States of America, but it is not specific exclusively to the American Federation. It has been adopted also by South American states and even some European countries, like Greece and Cyprus.

called preliminary or *a priori* review and regards the statutes before their entrance into force. Such a preventive review is performed by most of the constitutional authorities[9]. The aftermath of the *a priori* review is the fact that the normative act declared inconsistent with the Basic Law will not enter into force, thus avoiding the occurrence of unconstitutional provisions in the legislative system.

There is also a **repressive constitutional review** that concerns the normative acts which are already in force. It can be both abstract and concrete. This distinction is based on the origin of the alleged unconstitutionality. When the conformity of a normative act with the constitutional provision has been questioned by a political subject, like the members of the parliaments, the chief of the state or the chief of the government or other high authorities, like the general prosecutor, the president of the Supreme Court or the Ombudsman, we talk about an abstract constitutional review. It is considered to be an **abstract review** because it has no connection with a real conflict. On the contrary, the so-called **concrete constitutional review** has its roots into a judicial trial pending in front of a judicial court. A preliminary question of unconstitutionality can be raised whenever the interest of the justice requires that. The right to refer a question of unconstitutionality to the constitutional courts is given to the parties in a trial as an expression of the right to free access to a court and the right to a fair trial, but also as a testimony of the principle of rule of law. That's because the purpose intended to be touched is the resolution of the lawsuit on the basis of regulations whose constitutionality is beyond any doubt and the removal from legislation of the provisions infringing upon the texts or principles inscribed in the Basic Law[10].

The concrete (or incidental) review of constitutionality is specific to those states that have a diffuse system of judicial review, as it is, for instance, in the Unites States of America[11] or Portugal[12].

The procedural means are different in those countries where it has been adopted the centralized system of constitutional review. The question of unconstitutionality is referred by the ordinary courts to the constitutional authority entitled to perform the review of constitutionality. Romania, Italy[13], Lithuania[14] and Turkey[15] are some of the countries that have regulated such a mechanism.

Some constitutional courts have the ability to review the constitutionality of existent normative acts or of the acts which are about to enter into force, but also the unconstitutional legislative omissions[16]. The disregard of the provisions or the principles enshrined in the Basic Laws

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[9] Up until the constitutional amendment in 2008, the French Constitutional Council was often considered representative for this kind of review, taking into consideration the fact that it controlled only the constitutionality of the laws prior to their promulgation by the President of the French Republic.

[10] Valentina Bărbăţeanu, "Peculiar Aspects Regarding The Reiteration Of The Exception Of Unconstitutionality", *Constitutional Court's Bulletin* 2 (2001): 103, also available at the Internet address http://193.226.121.81/publications/buletin/13/barbateanuen.pdf.

[11] Article VI Section 2 of the United States Constitution provides as follows: *'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding'*. The full text of the American Constitution is available at http://www.senate.gov/civics/constitution_item/constitution.htm.

[12] Article 280 of the Constitution of Portugal. The full text of the Constitution is available at the Internet address http://www.tribunalconstitucional.pt/tc/conteudo/files/constituicaofrances.pdf.

[13] Section 23 of the Law No 87 of 11 March 1953 on the composition and procedures of the Constitutional Court, published in the Official Gazette No. 62, 14 March 1953. The full text is available at http://www.codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/ita?fn=document-frame.htm$f=templates$3.0

[14] Articles 106 paragraph 1 of the Constitution and Article 67 of the Law on the Constitutional Court.

[15] Article 152 of the Turkish Constitution. The full text is available at http://www.codices.coe.int/NXT/gateway.dll/CODICES/constitutions/ENG/EUR/TUR?f=templates&fn=default.htm

[16] This issue was the main theme of the XIVth Congress of the Conference of European Constitutional Courts held in Vilnius in 2008. The national reports on this subject were gathered in the collection *Problems of Legislative Omission in Constitutional Jurisprudence*, published by the Constitutional Court of Republic of Lithuania, Vilnius, 2008.

can be entailed by the lack of regulation where the Constitution provides the obligation of the legislator to enact certain rules. The most illustrative example in this regard is offered by the German Federal Constitutional Court[17].

3. Brief presentation of the other powers of constitutional authorities

Beside the constitutional review of normative acts, the authorities of constitutional justice are assigned to perform a wide range of powers that highlights their important role played in granting the supremacy of the Constitution.

Many constitutional courts are asked to decide on legal disputes of a constitutional nature between public authorities. Such a distinctive power is especially significant in what concerns the federal or regional states[18]. There are also states that have empowered the constitutional courts to settle the conflicts between the central and the local or regional authorities[19].

In Romania, this power is limited at the conflicts raised between the central authorities of the state[20]. Inspired by the experience of other States in what concerns the problems generated by this kind of conflicts, the delegated constituent legislator in Romania has amended the Basic Law in 2003 and has enlarged the powers of the Constitutional Court of Romania. From that moment on, in some of the most critical moments of the social and political life, the Romanian authority of constitutional justice has been asked to resolute intricate and delicate conflicts. It turned into a referee that had to deal with intense clashes of vanities and tried to reconcile strong and stubborn ambitions[21].

The authorities of constitutional justice - constitutional courts or other equivalent bodies – are also entitled to solve the appeals introduced in the electoral matters[22].

The compliance of the political parties with the constitutional standards is, in some states[23], assessed as well by the constitutional courts, which decide consequently on the dissolution or even banning of the political party that was proven that conducts contrary to the constitutional values.

There are also other multiple powers that are given in the constitutional courts competence in different states, but a complete overview would exceed the theme of the present study which, from this point of view, intended to highlight some of the most important functions of the authorities of constitutional jurisdiction.

4. The effects of the constitutional jurisdictions' decisions

The Romanian Constitution is one of the few basic laws in Europe that firmly and explicitly regulates the effects of the Constitutional Courts decisions. Article 147 par.1 of the Constitution stipulates that the provisions of the laws and ordinances in force, as well as any of the regulations

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[17] See Article 93(1),(3) and (4)(a) of the German Basic Law.

[18] Like Austria (Article 138 of the Constitution), Germany (Article 93(1)(1)(4) and (4)(b) of the Constitution) or Italy (Article 37 of Law N^{o} 87 of 11 March 1953).

[19] This is the case of the constitutional courts from Bulgaria (Article 149(1)(3) of the Constitution), Czech Republic (Article 87(1)(c) of the Constitution) or Hungary (Article 1(f) of the Law on the Constitutional Court).

[20] Article 147 letter e) of the Romanian Basic Law provides that the Constitutional Court decides on legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, the President of either of the Chambers, the Prime Minister, or the President of the Superior Council of Magistracy.

[21] See, in this regard, Mihai Constantinescu, Ioan Muraru, *Constituţia României revizuită - comentarii şi explicaţii*, (Bucureşti: All Beck, 2004), 232.

[22] France (Articles 58-60 of the Constitution), Austria (Article 141 of the Constitution), Lithuania (Article 105 par.3 subpar. 1 of the Constitution), Greece (Articles 58 and Article 100 paragraph 1 letter (a) – (b) of the Constitution), Bulgaria (Article 149(1)(6)-(7) of the Constitution), Italy (Article 33 of Law N^{o} 352 of 25 May 1970), Portugal (Article 225(2)(f) of the Constitution), Hungary and Romania.

[23] Czech Republic (Article 87(1)(j) of the Constitution), Germany (Article 21(2) of the Constitution), Poland (Article 188(4) of the Constitution), Portugal (Article 225(2)(e) of the Constitution), Slovak Republic (Article 129 (4) of the Constitution), Slovenia (Article 160(1)(10) of the Constitution), Turkey (Article 69(6) of the Constitution) or Romania (Article 146 Letter (k) of the Constitution).

which are held as unconstitutional, shall cease their legal effects within 45 days from publication of the decision rendered by the Constitutional Court where Parliament or Government, as may be applicable, have failed, in the meantime, to bring these unconstitutional provisions into accord with those of the Constitution. For this limited length of time the provisions declared unconstitutional shall be suspended as of right.

A similar provision can be found in the Constitution of the Slovak Republic[24]. Article 125 Paragraph 3 of the mentioned Basic law affirms that whenever the Constitutional Court holds by its decision that there is inconformity between legal regulations, the respective regulations, their parts or some of their provisions shall lose effect. The bodies that issued those legal regulations shall be obliged to harmonize with the Constitution, with constitutional laws and with international treaties promulgated in the manner laid down by a law, and in cases stipulated by the Constitution also with other laws, governmental regulations and with generally binding legal regulations of Ministries and other central state administration bodies within six month from the promulgation of the decision of the Constitutional Court. If they fail to do so, those regulations, their parts or their provisions shall lose effect after six months from the promulgation of the decision.

Prior to the constitutional amendment in 2003[25], the Romanian Basic law adopted in 1991, the effects of the Constitutional Court's decision has been disputed, due to the fact that the initial formulation of the constitutional norm was vague and equivoque. The Constitutional Court itself had to underline in its case law the generally binding effect of its decisions that declare the inconsistency with the Constitution of the normative acts[26]. It has noted that if one accepts the idea that the Court's decisions of unconstitutionality do not produce *erga omnes* effects, it would be unacceptable the possibility that a certain legal provision which has been declared incompatible with the Constitution to be, on one hand, un-applicable within the judicial trial that was the framework of the objection of unconstitutionality solved by the Constitutional Court, and in the same time, on the other hand, to be unimpeded applicable in any other judicial trial. The Constitutional Court stated that this kind of consequences would be un-doubtfully contrary to the principle of the equality in front of the law and of the public authorities enshrined in the Article 16 paragraph 1 of the Romanian Basic Law and it would also ignore the duty to observe the Constitution, enshrined in the Article 51 of the Basic Law.

The Court also highlighted that the Parliament has the liability to take necessary action in order to amend or abrogate the normative act or the legal provision declared unconstitutional. Still, even if the legislator remains passive, the Constitutional Court's decision will, nevertheless, produce its abrogative effects[27].

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[24] The full text of the Slovak Republic's Constitution can be found at http://portal.concourt.sk/download/attachments/3604914/ustava_a.pdf.

[25] The Constitution of Romania was amended and supplemented by the Law on Revision of the Constitution of Romania, No. 429/2003, published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003; republished, with updated designations and new successive numbers for the texts, in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003. The Law on Revision of the Constitution of Romania, No. 429/2003, was approved by the national referendum of 18-19 October 2003 and came into force on 29 October 2003, the date of publication in the Official Gazette of Romania, Part I, of the Constitutional Court Ruling no. 3 of 22 October 2003, confirming the results of the referendum held on 18-19 October 2003 as to the Law on Revision of the Constitution of Romania. The Constitution of Romania, in its initial form, was published in the Official Gazette of Romania.

[26] Decision no.98 of the 5th of April 2001, published in the Official Gazette of Romania, Part I, no. 256 of the 18th of May 2001, Decision no.169 of the 2nd of November 1999, published in the Official Gazette of Romania, Part I, no. 151 of the 12th of April 2000.

[27] The Constitutional Court has stated that the declaration of unconstitutionality is a sanction more severe that the abrogation of the norm. See Decision no.1039 of the 5th of December 2012, published in the Official Gazette of Romania, Part I, no.61 of 29th of January 2013.

The Court has stated that it hasn't got the power to abrogate a legal provision, but the effect of its decisions that declare the inconsistency with the Basic Law is similar to the effect of a genuine abrogation performed by the Parliament[28].

5. The *ex nunc* or *ex tunc* effect of various constitutional courts' decisions

According to Article 147 paragraph 4 of the Romanian Constitution, as from the publication of the Constitutional Courts' decisions in the Official Gazette of Romania, they shall be generally binding and take effect only for the future. In its case law, the Constitutional Court has stated that this *pro futuro* effect of its decisions owes its consecration to the respect of the non-retroactivity principle, which is enshrined in the Article 15 par.2 of the Basic Law. This fundamental rule is a powerful safeguard of the legal certainty and an effective way to strengthen the citizens' confidence in the legal system. It also can be seen as a major prerequisite of the observance of the check and balance rules of the states' powers, concurring at the reinforcement of the essential character of the Romanian State as a state governed by the rule of law.

As a proof of the diversity of the legislative choices within the European model of constitutional review, the effects of the decisions of some other constitutional courts have been regulated from a different point of view. Thus, the decisions of some constitutional courts are governed by the principle of retroactive application. The most representative examples in this regard are offered by the German and Belgian system of constitutional review.

According to the tradition of the German public law, a provision which violates higher-ranking law shall be null and void *ipso jure* and *ex tunc*[29].

In Belgium, the annulled legal provision will be erased from the legal order, as if it had never been adopted[30]. The idea on which is based such a solution derives from the fact that the annulled provision has been unconstitutional from the very beginning, meaning from the moment it has been adopted by the legislative body. Accordingly, the legal provision will be abolished *ex tunc*. In order to temper the drastic effects of retroactive application of its decisions, the Constitutional Court of Belgium indicates the effects of invalidated provisions that shall be considered final and those that shall be temporarily maintained for a period of time which is expressly specified[31].

There is a mixture of retroactive and non-retroactive application of the decisions of annulment in Austria. In most of the cases, the decisions of the Austrian Constitutional Court take effects only for the future, but, in some cases, the Court may choose to declare inapplicable a general normative act with retroactive effect[32].

It has to be noted that, in any situation, the retroactive application of the annulment of the normative acts jeopardies the legal stability and puts under question the authority of *res judicata* of the decisions that have been rendered by the ordinary courts.

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[28] Decision no.98 of the 5th of April 2001.

[29] Valentin Zoltan Puskás, Károly Benke, "Enforcement Of Constitutional Court's Decisions", part of the *General report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Constitutional Court of Romania* with the theme „Constitutional Justice: Functions And Relationship With The Other Public Authorities". All the national reports, along with the General Report were published in the book of the Congress: *Justiţia constituţională. Funcţii şi raporturi cu celelalte autorităţi publice – Drept constituţional comparat*, (Bucureşti: Universul Juridic, 2012): 81, (further on referred to as *Justiţia constituţională…)*.

[30] G. Rosoux, F. Tulkens, "Considérations théoriques et pratiques sur la portée des arrêts de la Cour d'Arbitrage", *La Cour d'Arbitrage : un juge comme les autres?*, (Liège, 2004): 105 and 134, cited by Marc Bossuyt and Riet Leysen in the National Report of the Constitutional Court of Belgium, in *Justiţia constituţională*…, 155.

[31] According to Article 8 paragraph 2 of the Special Act of the 6th of January 1989 on the Constitutional Court, published in the Official Gazette of Belgium of the 7th of January 1989, *"Where the Court so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court"*.

[32] Valentin Zoltan Puskás, Károly Benke, op.cit., 82.

6. The ability of the constitutional courts to modulate in time the effects of their decisions

In **Belgium**, the annulled legal norm can be still applied in some certain situations[33]. The Court will use this legal possibility on the basis of opportunity, in the virtue of its sovereign power[34]. When the Court decides to maintain the effects of an annulled legal provision, it takes into consideration not only the interests of the plaintiff, but also the requirements of the needs of the whole justice system.

Preservation of the effects of the annulled norms can be final, or temporary, for a certain period of time, established by the Court. In this situation, the Court can decide to keep the effects of the annulled legal norms up to a precise moment in time, which can be either prior or subsequent to the decision of annulment[35].

In **Italy**, the situation is different, because the temporal effects of the decisions of unconstitutionality are rigidly fixed[36]. Article 136 of the Italian Constitution states that when the Constitutional Court declares the constitutional illegitimacy of a law or enactment having the force of law, the law ceases to have effect from the day following the publication of the decision[37]. The loss of effectiveness of the measures affects all pending cases, which means that the Court's decisions have retroactive effect, since they apply to events which materialized previously too, with the exception of those circumstances which are part of legal relationships that have already been conclusively settled[38].

Nevertheless, the Italian Constitutional Court can limit the retrospective effects of unconstitutionality by the means of decisions pronouncing a so-called "intervening unconstitutionality". Typical for this kind of decisions is the fact that the Court declares that a particular legal provision which was compatible with the Constitution upon its entry into force became unconstitutional only later, when certain events arose[39]. In other words, the norm is not nullified *ab initio*, but only from the moment at which it becomes defective. An illustrative example would be the occurrence of a change in the economical or financial environment, in social attitudes or a more general change in conditions that leaves a norm incompatible with the Constitution[40].

Another technique that allows the Constitutional Court of Italy to modulate in time the effects of a declaration of unconstitutionality is to postpone them. Eloquent in this regard would be the case of those judgments that lead to expenses for the public treasury. The Court offers the legislature a fixed amount of time to act before the statute is nullified. The decisions of this kind are called decisions of 'deferred unconstitutionality'. The Court itself, based on the balancing of various constitutional values, pinpoints the date on which the law is nullified[41].

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[33] Due to the provisions of the Article 8 paragraph 2 of the Special Act on the Constitutional Court.

[34] Marc Bossuyt and Riet Leysen, op.cit., 155.

[35] G. ROSOUX, „Le maintien des «effets» des dispositions annulées par la Cour d'arbitrage : théorie et pratique", *Liber Amicorum P. Martens*, (Bruxelles: Larcier, 2007): 444-445, cited by Marc Bossuyt and Riet Leysen, op.cit.155.

[36] Groppi, Tania, "The relationship between constitutional courts, legislators and judicial power in the european system of judicial review. towards a decentralized system as an alternative to judicial activism?" (further on referred to as "The relationship…", report presented at the Conference "Judicial activism and restraint theory and practice of constitutional rights", held in Batumi, Georgia, 13-14 July 2010, by the European Commission For the Democraxy Through Law (The Venice Commission) and the Constitutional Court of Georgia, published in CDL-JU(2010)012, Strasbourg, the 7th of July 2010, available at the Internet address http://www.venice.coe.int/docs/2010/CDL-JU(2010)012-e.asp?MenuL=RUS.

[37] The full text of the Italian Constitution can be found at http://www.senato.it/.

[38] National Report of the Constitutional Court of Italy, in *Justiția constituțională*…, 331.

[39] Ibidem, 331.

[40] Groppi, Tania, op.cit., 8.

[41] Ibidem.

In case of judgments affirming 'established, but not declared unconstitutionality', no deadline for Parliamentary intervention is fixed. The assumption is, however, that such intervention shall take place as soon as possible. Certain cases do arise in which the Court sets a deadline; this happens when it is possible to identify a specific moment in which the situation of incoherence with the Constitution will become so serious as to be intolerable (for example, the deadline set for implementation of an European directive may be relevant in this sense)[42].

It has been said that „the highly political nature of some issues, combined with the need to balance the defense of social rights against the state's financial crisis, have obliged the Constitutional Court to modulate the temporal effects of its decisions that strike down laws as unconstitutional. In this way, the Court tries both to assure that the Government and Parliament have the time needed to fill the gap created by its nullification of a statute, and to strike a balance between the constitutional rights central to the social welfare state and the scarcity of economic resources"[43].

Actually, there are several other constitutional courts that have the possibility to postpone the entry into force of their decisions of unconstitutionality and to set a deadline for the law-maker in order to bring the normative act into line with the Constitution. As for the terms established by the decisions of Constitutional Courts, their purpose is, in most cases, to grant the legislator the time necessary to take the measures required for eliminating a legislative gap or to regulate a specific issue in accordance with the Constitution[44]. It is also important to note that the principle of separation of powers prevents the constitutional court to force the legislator to adopt a law or to set terms for this purpose.

Germany is one of the countries that use this mechanism in order to modulate in time the effects of its decisions. The Federal Constitutional Court[45] sets a deadline in the event of a mere declaration of incompatibility for the temporary further application of the provision. The Court can also fix a date up until the legislature has to create a new regulation within a certain period. The length of the said period is set according to aspects like the gravity of the violation or other urgencies, the complexity of the necessary new provision and special requirements of the matter[46].

These deadlines vary from one to two years. But sometimes they can be even longer[47]. For instance, the legislator was given a deadline of almost three years to adopt a new regulation regarding the election scrutiny procedure consecutive to the declaration of unconstitutionality of one of the provisions of electoral law[48]. Deadlines of less than one year are also sometimes set. Thus, the legislature was set a deadline of less than eleven months for the new regulation of social benefit provisions which the Court declared to be unconstitutional because the envisioned amounts for safeguarding the subsistence minimum required by the Constitution had not been ascertained in a procedure that was transparent and expedient[49].

In a case of a law regarding the property tax, the Federal Constitutional Court ordered its continued application, avoiding in this manner the unwanted legal consequences that could occur if the legislature failed to comply with the demand to create provisions or did not do so within the deadline set for it. The Court had explicitly ordered that the Property Tax Act should continue to

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[42] National Report of the Constitutional Court of Italy, in *Justiţia constituţională*…, 333.

[43] Groppi, Tania, op.cit.7.

[44] Tudorel Toader, Marieta Safta, General Report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Constitutional Court of Romania, *Justiţia constituţională*…, 45.

[45] Bundesverfassungsgericht.

[46] Gertrude Lübbe-Wolff, "The Constitutional Court's Relationship To Parliament And Government", National report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Federal Constitutional Court of Germany, *Justiţia constituţională*…, 285.

[47] Ibidem.

[48] See The Federal Constitutional Court's Collection of Decisions (Entscheidungen des Bundesverfassungsgerichts – BVerfGE) BVerfGE 121, 266 <316>.

[49] BVerfG, judgment of the First Senate of 9 February 2010 – 1 BvL 1/09 et al. – www.bverfg.de.

apply until 31 December 1996 "at most"[50]. Had no new provision been created by then, it was clear that on expiry of this deadline the provisions of the Property Tax Act in question could no longer apply and that this tax could no longer be levied[51].

Still, it has to be mentioned that there is no explicit constitutional or statutory provision to ascertain the possibility of the Court to set this kind of deadlines. However, the Court is entitled to impose deadlines to the legislator on the basis of and in the context of its power to review the constitutionality of statutes[52] and it is customary for the legislature to comply with such a mandate to create provisions in a timely fashion[53].

The French Constitutional Council also has got the possibility to determine the moment that represents the starting line for the effects of its decisions. There has to be made a necessary distinction between the *a priori* and the *a posteriori* review of constitutionality.

In what concerns the constitutional review of the laws before their promulgation, this ability was very seldom used. The Council has postponed the effects of the decision of unconstitutionality, for instance, in the case of the Law regarding the genetically modified organisms[54]. The law has been promulgated and it has entered into force, but the Council has set an interval of time of six months in order to give the Parliament the chance to redress the constitutionality of the law. The Parliament has very soon fulfilled this obligation, adopting the law in accordance with the constitutional requirements[55].

The constitutional amendment in 2008 has opened the path to the *a posteriori* review of constitutionality[56]. This kind of review concerns the laws that are already in force. It has been described as a true revolution in comparison with juridical traditions of the French Republic[57]. Beginning from the 1st of March 2010, the French Constitutional Council has entered into a new era of evolution. In this context, Article 62 Paragraph 2 of the French Constitution[58] states that a provision declared unconstitutional following the *a posteriori* review shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

Thus, a decision of unconstitutionality entails the abrogation of the legal provision declared inconsistent with the Constitution. On the basis of the fore-mentioned constitutional norm, the Constitutional Council can decide to alter in time the effects of this abrogation[59].

The Constitutional Council has already make use of this ability and, in several occasions, has established a future moment in time up until the norm remained in force. In this way, the Council offered the Parliament the opportunity to modify the legal provision and to avoid, in this manner, a legislative vacuum. Only if the legislative power does not fulfill this duty within the fixed deadline the legal provision ceases its effects.

For example, regarding the legal provisions that regulate the pensions paid to the former combatants who have lost the French citizenship due to the decolonization, the Council has stated[60]

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[50] BVerfGE 93, 121 <122>.

[51] Reinhard Gaier, Enforcement Of Constitutional Court's Decisions, in National report prepared for the XVth Congress of the Conference of European Constitutional Courts by The Federal Constitutional Court of Germany, *Justiția constituțională*…,,307.

[52] Reinhard Gaier, op.cit, 306.

[53] Ibidem.

[54] Decision 2008-564 DC of the 19th of June 2008.

[55] Law no. 2008-757 of the 1st of August 2008.

[56] Guy Carcassonne, "Le Parlament et la question prioritaire de constitutionnalité", *Pouvoirs* 137 (2011): 74.

[57] Emmanuel Piwnica, „L'appropriation de la question prioritaire de constitutionnalité par ses acteurs", *Pouvoirs* 137 (2011): 109.

[58] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleVII .

[59] Dominique Rousseau, "Le process constitutionnel", *Pouvoirs* 137 (2011): 54.

[60] In the Decision 2010-1 QPC of the 28th of May 2010. The so-called "crystallization of the pensions" decision is the first decision rendered by the French Constitutional Council on the basis of its new power.

that they have to be abrogated starting from the 1st of January 2011. By another decision[61], the Council has postponed up until the 1st of July 2011 the abrogation of the legal provisions regarding the preventive custody.

Unlike the fore-mentioned states, there are also some other states where the constitutional courts do not have the legal habilitation to postpone the moment when the norm declared unconstitutional cease its effects. This is the case of Portugal or Romania.

In the dawn of the **Romanian Constitutional Court**'s activity, there was a situation[62] when it has been imposed a deadline to the Parliament for adopting a new regulation regarding the protection of the public property. The legal provision at stake was comprised in the Criminal code and offered a superior protection to the public property of the State in comparison with the private property of natural or legal persons. The legislator was urged to bring the regulation in accordance with the new constitutional regime which granted an equal protection and contrasted with the former communist manner of property protection. The panel of three constitutional judges[63] has fixed a deadline to which the Parliament, as the sole legislative power, to regulate in a proper way this unconstitutional aspect.

This solution was considered adequate at that moment, taking into consideration the fact that the decision stating the inconsistency with the Basic law provisions produced its abrogative effects from the very moment of their publication in the Official Gazette. Such a rule entailed sometime undesired consequences like the occurrence of a legislative void generated by the passive attitude of the legislative power. Nor the Parliament or the Government had any expressly mentioned obligation to elaborate a new regulation when the Constitutional Court declared the unconstitutionality of various legal provisions. On that occasion, the Court stated that if the Parliament did not proceed at the modification of the unconstitutional legal provisions by the date of the 30th of November 1993, the abrogation would have taken effect beginning from the 1st of December 1993 and, along with it, all the negative consequences intended to be avoided in the interest of the society and of the rule of law. Thus, the Court has decided to maintain in the legal system unconstitutional norms, until the mentioned deadline established for the Parliament.

It has to be underlined that this solution was strongly criticized and, eventually, appealed. The same solution regarding he deadline was adopted once again[64], but based on a very fragile majority within the panel of five judges. It's been said, in this concern, that such a solution raised serious question marks regarding its constitutional grounds.

The contradiction was finally resolved by the Plenum of the Constitutional Court[65] which has decided that the Parliament cannot be pushed to action in a certain manner and, consequently, the Constitutional Court is not entitled to establish any deadline until when the legislative power has to fulfill the duty to change the unconstitutional norm. In addition, the decision was blamed for the fact that it would abusively confer to the Constitutional Court the power to prolong the effects of abrogated legal provisions, disregarding in this way the requirements of the principle of the separation of powers in the State. Taking into consideration the fact that the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country, it's been also said that the Constitutional court cannot force it to carry on any activity, no matter how important would be the issue at stake.

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[61] Decision 2010-14/22 QPC of the 30th of July 2010.

[62] Decision no.31 of the 26th of May 1993, published in the Official Gazette of Romania, Part I, no. 13 of the 19th of January 1994.

[63] Which decided in the first instance according to the provisons of the Law 47/1992 in the initial formulation.

[64] Decision no.38 of the 7th of July 1993, published in the Official Gazette of Romania, Part I, no.176 of 26 of July 1993.

[65] Plenum Decision no.1 of the 7th of September 1993, published in the Official Gazette of Romania, Part I, no.232 of the 27th of September 1993.

Thanks to the constitutional revision in 2003, the problem has been clarified through the Article 147 of the Basic law, as it has previously shown.

7. Conclusions

This comparative approach proves that the constitutional authorities in some countries have reached the conclusion that it is appropriate to offer some flexibility to the temporal effects of their decisions that affect the existence of normative acts or legal provisions. The final goal would be a more efficient legislative activity. That is because the constitutional judge could offer the legislative branch a margin of appreciation and an adequate period of time to adopt a new regulation instead of the one that has been declared contrary to the Basic Law. Such a delay of entering into force of the abrogative effects of constitutional courts' decisions can sometime be used when a smoothly redress of the unconstitutionality is preferable to a sudden abrogation. Situations like this are preferable if in the absence of a gradual transition from an unconstitutional state of law to a constitutional one a situation even less constitutional would be created. The constitutional courts that practice this postponement of the effects of their decisions are taking into consideration the possible risk that might appear along with the annulment of the unconstitutional norms. The balance that has to be kept between various constitutional values is always taken into consideration and the preservation of legal stability with the aftermath of the enforcement of the human rights and freedoms safeguards is a constant and permanent goal of the constitutional jurisdictions.

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