STRENGTHENING THE ROLE OF THE CONSTITUTIONAL COURT BY RESPECTING THE UNCONSTITUTIONALITY DECISIONS

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Abstract

As a result of the revision of the Constitution in 2003, art. 147 of the Basic Law strengthened the binding legal effect of decisions declaring the unconstitutionality of laws and ordinances, an aspect that was required to strengthen the role of the Constitutional Court. Thus, according to art. 147 para. (4) of the Constitution, the decisions of the Constitutional Court are published in the Official Gazette of Romania. From the date of publication, decisions are generally binding and have force only for the future.

From the moment the decisions of the Constitutional Court are published in the Official Gazette of Romania, the legal norms declared as unconstitutional cease to have legal effects for the future.

As the Constitutional Court ruled, regarding the general binding effect of its decisions, jurisprudence must be taken into account by all authorities involved in the process of applying laws and Government ordinances. The constitutional consecration of the general binding character of the decisions of the Constitutional Court determines that they are imposed on all legal subjects, just like a normative act, unlike the decisions of the courts, which produce effects inter partes litigantes.

But, as I will highlight in this study, the effectiveness of unconstitutionality decisions depends on the behavior of public authorities after the moment Constitutional Court states a non-compliance with the provisions of the Basic Law.

Keywords: *Constitutional Court, decisions, unconstitutionality, authorities, effects.*

1. Introduction

According to art. 142 para. (1) of the Constitution, CCR is the is the *guarantor of the supremacy of the Fundamental Law* and, according to art. 1 para. (2) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court, republished, this is the sole authority of constitutional jurisdiction in Romania.

By means of dec. no. 727/2012[1], CCR has highlighted the fact that one dimension of the Romanian state is constitutional justice, carried out by the Constitutional Court, a political and jurisdictional public authority that does not fall under the scope of the legislative, executive or judicial power, its role being to ensure the supremacy of the Constitution, as the fundamental law of the rule of law.

Furthermore, by means of dec. no. 377/2017[2], CCR pointed out that in Romania, the constitutional review is carried out by the Constitutional Court, the only authority of constitutional jurisdiction, and therefore neither the HCCJ nor the courts or other public authorities of the State have the power to review the constitutionality of laws or ordinances, whether or not they are in force.

2. Paper content

While there are still disputes as to whether the jurisprudence of the courts is creative, with specialists placing it between two limits - between de jure denial and de facto recognition - the jurisprudence of the Constitutional Court has been consistent, Starting with *Plenary Decision no. 1/1995*[3], in holding that the power of *res judicata* which accompanies judicial acts, and therefore also the decisions of the Constitutional Court, attaches not only to the operative part but also to the considerations on which it is based. Therefore - the Constitutional Court held that -, both the Parliament, and the Government, respectively public authorities and

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[1] CCR dec. no. 727/09.07. 2012, published in the Official Gazette of Romania no. 477/12.07.2012.

[2] CCR dec. no. 377/31.05.2017, published in the Official Gazette of Romania no. 586/21.07.2017.

[3] Plenary Decision no. 1/1995 on the binding nature of the decisions of the Constitutional Court pronounced within the constitutional review published in the Official Gazette of Romania no. 16/26.01.1995.

institutions must fully observe both the recitals and the operative part of the decisions pronounced by the Constitutional Court[4].

„The constitutional review is not a brake on democracy, but a necessary instrument, as it allows the parliamentary minority and citizens to ensure that the provisions of the Constitution are observed, and is a necessary counterweight to the parliamentary majority, should it deviate from the letter and spirit of the Constitution. The democratic legitimacy of this control derives from the election or appointment of constitutional judges exclusively by constitutional authorities directly elected by the people (Chamber of Deputies, Senate, President of Romania). It is therefore natural for the Constitutional Court to participate - in the forms determined by the Constitution - in the legislative process. In this process, however, the Constitutional Court is constrained by some external requirements, which mainly concern the fact that *it cannot replace the legislator*, and by some internal requirements, due to the fact that *its solutions must be justified by legal reasoning*. At the same time, as resulting from specialised literature review, „through the contribution of judicial practice, significant improvements have been made to legislation[5]".

Constitutional review is completed by decisions, which, according to art. 145 para. (2) of the Constitution, are binding and have force only for the future. If the unconstitutionality is found by decision, it shall have *erga omnes* effects, namely it has a general binding effect on all public authorities, citizens and private legal persons. Due to these grounds, a not inconsiderable part of the constitutional doctrine assimilates these decisions to acts having the force of law. (…)

Due to the general binding effect of the decisions of the Constitutional Court, its case law must be taken into account by all bodies involved in the process of drafting and implementing laws and government ordinances, as well as by the Chambers when drafting or amending Parliament's regulations".

Art. 147 para. (1) of the Constitution establishes, in what concerns laws and ordinances in force, found to be unconstitutional, that „they shall cease their legal effects within 45 days of the publication of the decision of the Constitutional Court if, in the meantime, the Parliament or the Government, as the case may be, cannot bring into line the unconstitutional provisions with the provisions of the Constitution. For this limited length of time the provisions found to be unconstitutional shall be suspended *de jure*".

The decision finding unconstitutionality[6] is part of the normative legal order, with the effect that the unconstitutional provision ceases to apply for the future[7]. It is incumbent on Parliament or, as the case may be, on the Government, to repeal or amend those legislative acts, bringing them into line with the Fundamental Law. The intervention of Parliament or the Government within the period during which the provisions found to be unconstitutional are suspended by operation of law, within the meaning of those laid down by the decision of the Constitutional Court, is an expression of the final and generally binding nature of the CCR decisions.

Therefore, as the Constitutional Court stated[8], if the Parliament or the Government does not intervene or delays, the decision of the Constitutional Court shall continue to have effect, being enforceable *erga omnes*, in order to ensure the supremacy of the Constitution.

By means of dec. no. 2/11.01.2012[9], CCR has stated that this binding nature does not apply to decisions finding the constitutionality of a legislative act because such an interpretation would mean that the Court could never go back on its own case law, being bound by its own previous findings. Furthermore, as the doctrine noted, „in the absence of express regulation of the meaning of certain legal institutions in the Constitution of Romania, it is incumbent on the Constitutional Court of Romania to establish, through its case law, by binding decisions, the manner of interpretation of constitutional texts"[10].

In order to capture the power of res judicata that accompanies the CCR decisions, we must distinguish in their typology between simple decisions and interpretative decisions.

Simple decisions are those which find either the law or the ordinance unconstitutional in whole or in part, or the constitutionality of these normative acts in relation to the objections of unconstitutionality raised. In the

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[4] We note that CCR has also invoked the *res judicata* power attached to the recitals of the Constitutional Court's decision in other decisions, for example: dec. no. 196/2013, published in the Official Gazette of Romania no. 231/22.04.2013; dec. no. 163/2013, published in the Official Gazette of Romania no. 190/04.04.2013; dec. no. 102/2013, published in the Official Gazette of Romania no. 208/12.04.2013; dec. no. 1039/2012, published in the Official Gazette of Romania no. 61/29.01.2013 and others.

[5] E.E. Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrative (Legal liability. A special look at liability in administrative law)*, Pro Universitaria Publishing House, Bucharest, 2013, p. 318.

[6] C. Ene-Dinu, *Constitutionality and referral in the interests of the law*, in LESIJ - Lex ET Scientia International Journal no. XXIX, vol. 1/2022, p. 68.

[7] CCR dec. no. 847/08.07.2008, published in the Official Gazette of Romania, Part I, no. 605/14.08.2008.

[8] CCR dec. no. 71/08.02.2005, published in the Official Gazette of Romania, Part I, no. 380/05.05.2005.

[9] CCR dec. no. 2/11.01.2012, published in the Official Gazette of Romania, Part I, no. 131/23.02.2012.

[10] E.E. Ștefan, *Scurte considerații asupra răspunderii membrilor Guvernului (Brief considerations on the accountability of the members of the Government)*, in Public Law Magazine no. 2/2017, p. 83.

first case, the provisions of art.147 para. (1) of the Constitution become applicable: the legal norm is suspended by law and, insofar as the original or delegated legislator does not intervene, it ceases to have effect and thus no longer forms part of the active substance of the legislation.

The literature[11] stated that, in a broad sense, *interpretative decisions* shall mean all the decisions of the Constitutional Court which do not include a simple declaration of the constitutionality/unconstitutionality of the objected regulations. The authors point out that in distinguishing between simple and interpretative decisions, we consider both the structure and content of the recitals and the operative part, i.e. the circumstance of constitutionality or unconstitutionality, as the case may be, in the operative part of the decision. This is because, in most cases, the interpretations that the Constitutional Court makes only in the recitals are inherent to the examination of constitutionality, supporting the construction of the reasoning leading to the operative part of the decision. In other words, every decision of the Constitutional Court is based on a legal interpretation, but not every decision of the Constitutional Court is an interpretative decision. It should be noted that neither the Constitution nor Law no. 47/1992 on the organisation and functioning of the Constitutional Court makes any distinction in this respect, as they refer only to the constitutionality or unconstitutionality of normative acts[12]. Of course, interpretative decisions also find constitutionality or unconstitutionality, but in a certain interpretation of the wording of the law subject to constitutional review. In this way, the wording of the law is „saved", in the sense that it can continue to be applied, but in the mandatory interpretation established by the Constitutional Court, i.e. with the elimination of the interpretation found to be unconstitutional[13].

With regard to interpretative decisions, dec. no. 898/30.06.2011[14] pointed out that «where the Constitutional Court has found the constitutionality of the objected wording on a particular interpretation, resulting either directly from the operative part of the decision or indirectly from the correlation of the recitals with the operative part of the decision, raising again a plea of unconstitutionality with regard to the same wording and with identical reasoning, the trend is to defeat the generally binding nature of the decision of the Constitutional Court, which also applies to decisions finding the constitutionality of laws or ordinances or provisions thereof. If, in the second case, in order to give greater force to the decision and without marking a reconsideration of its case-law, the Court is competent to rule even in the sense of admitting the objection raised and finding that the challenged wording is unconstitutional on an interpretation contrary to the previous decision (dec. no. 536/28.04.2011, published in Official Gazette of Romania, Part I, no. 482/07.07.2011), in the first case, the provisions of art. 29 para.(3) of Law no. 47/1992 shall become applicable, namely „provisions found to be unconstitutional by a previous decision of the Constitutional Court cannot be the subject of the exception". The reason for the application of these legal provisions is that, irrespective of the interpretations that can be given to a wording, when the Constitutional Court has ruled in the operative part of its decision under art. 146(d) of the Constitution that only a certain interpretation is in conformity with the Constitution, the presumption of constitutionality of the wording is maintained in this interpretation, but all other possible interpretations are excluded from the constitutional framework. Therefore, the Court holds that in such a situation the plea of unconstitutionality was admissible.»

The Constitutional Court has held that its decisions are part of the normative legal order[15]. Therefore, „simple (or extreme) decisions to admit applications for unconstitutionality or those of interpretation represent a separate formal source of constitutional law, take over the legal force of the constitutional rules they interpret and are addressed to all subjects of law. Therefore, despite the jurisdictional nature, art. 147 para.(4) of the Constitution gives the above decision the force of the constitutional norms, which it does not limit to the given case, but gives it an *erga omnes* nature, which means that it must be observed and applied by all subjects of law to which it is addressed. Therefore, the Court considers that, although its decision is not identified with the rule/legislative act, its effects are similar to it, so that, by means of them, the decision lays down rules of conduct to be followed, so that it is part of the normative order of the State."

Raising a plea of unconstitutionality on grounds already clarified by the Constitutional Court in its case law tends to undermine the generally binding nature of the Constitutional Court's decision, which also applies to decisions finding the unconstitutionality of laws or ordinances or provisions thereof.

By means of dec. no. 536/2011[16], the Court has held that, „irrespective of the interpretations that may be given to a wording, when the Constitutional Court has ruled that only a particular interpretation is consistent

[11] T. Toader, M. Safta, *Dialogul judecătorilor constituționali (Dialogue of constitutional judges)*, Universul Juridic Publishing House, Bucharest, 2015, p. 45.

[12] C. Ene-Dinu, *A century of constitutionalism,* in LESIJ - Lex ET Scientia International Journal no. XXIX, vol. 2/2023, p. 135.

[13] C. Ene-Dinu, *Rolul practicii judecătorești în elaborarea dreptului,* Universul Juridic Publishing House, Bucharest, 2022, p. 137.

[14] CCR dec. no. 898/30.06.2011, published in the Official Gazette of Romania no. 706/06.10.2011.

[15] CCR dec. no. 650/25.10.2018, published in the Official Gazette of Romania no. 97/07.02.2019.

[16] CCR dec. no. 536/28.04.2011, published in the Official Gazette of Romania no. 482/07.07.2011.

with the Constitution, thus maintaining the presumption of constitutionality of the wording in that interpretation, both the courts and the administrative bodies must comply with the decision of the Court and apply it as such".

Whether we are considering simple or interpretative decisions, in a state governed by the rule of law, as Romania is proclaimed in art. 1 para. (3) of the Constitution, public authorities shall not enjoy any autonomy in relation to law. The Constitution established in art. 16 para. (2) that no one is above the law, and in art. 1 para. (5) the observance of the Constitution, its supremacy and the laws shall be mandatory.

In this respect, by means of dec. no. 85 of 24 February 2020[17], the contentious constitutional court stated that „observing the supremacy of the Constitution, a corollary of the rule of law, is not limited only to observing its letter. If this were the case, a Constitution would never be sufficient, because it could never explicitly regulate solutions for all situations that may arise in practice, including relations between public authorities of constitutional rank." Therefore, „accepting a strictly literal and fragmented interpretation of the Constitution could lead to the conclusion that anything not expressly prohibited by the constitutional wording is permitted by it, even if it would obviously contravene the logic and spirit of the Constitution, and such a conclusion is unacceptable, as it is incompatible with the principles of the rule of law."

The specialised literature has pointed out that the violation by the legislative, executive or judicial power of the specific effects of constitutional law attached to the CCR decisions entails the following legal consequences/sanctions[18]: with reference to the legislative power, declaring the unconstitutionality of the legislative solution that reaffirms a legislative solution the unconstitutionality of which was previously established; with reference to the executive power, either the unconstitutionality of the legislative solution promoted, when the Government acts as a delegated legislator, or the direct censorship of administrative acts by the courts through contentious administrative, under art. 126 para.(6) of the Constitution; with reference to the judicial power, either the refutation in appeals of court decisions that do not observe the effects of the Court's decisions, or the potential triggering of a legal conflict of constitutional nature.

Therefore, the authority of the CCR's decisions loses face when there is a long delay by the Chambers of Parliament in reviewing provisions found to be unconstitutional.

Moreover, we mention, by way of example, the case in which the Constitutional Court was called upon to rule on the constitutionality of a legislative solution, *i.e.*, more than simply finding the unconstitutionality of the legal provision referred to it. By means of Decision no. 727/2012[19], the Constitutional Court ruled that the solution chosen by the Government to adopt, shortly before the Constitutional Court ruled on the constitutionality of the Law amending para. (1) of art. 27 of Law no. 47/1992, an emergency ordinance, which took over the entire normative content of the challenged law, called into question the unconstitutional and abusive conduct of the Government towards the Constitutional Court. In this regard, the Court finds that, according to its case law, subsequent primary legislation cannot preserve the normative content of an unconstitutional legal rule and thus being an extension of its existence.

In most of the cases, where public authorities have acted contrary to the CCR decisions, the Court has intervened within the limits of its constitutional jurisdiction. Therefore, in exercising *a priori* control, in finding the unconstitutionality of a legislative act which preserves a legislative solution declared unconstitutional, the Court held that „the adoption by the legislator of the rules contrary to those ruled in a decision of the Constitutional Court, which tends to preserve legislative solutions affected by defects of unconstitutionality, violates the Fundamental Law"[20].

By means of dec. no. 302 of 27 March 2012[21], the contentious constitutional court noted the following: „the finding, by means of a decision of the Constitutional Court, of the unconstitutionality of a legal wording entails *erga omnes* legal effects, a consequence deriving from the uniqueness and independence of the authority of constitutional jurisdiction. Otherwise, the decision of the Court - of dismissal - is still of a general binding nature and is binding only for the future, under art. 147 para. (4) of the Constitution, meaning that the public authorities involved in the case in which the exception was raised shall be bound to observe the decision, both the operative part and the grounds on which it was based, but the legal effect of such a decision is limited only to the procedural framework of the litigation in which the exception was raised, so it has an *inter partes* nature. Therefore, the same legal wording can be brought back to the Constitutional Court for examination, given that new aspects and constitutional grounds may be revealed, which may justify a different solution in the future.

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[17] CCR dec. no. 85/24.02.2020, published in the Official Gazette of Romania no. 195/11.03.2020.

[18] See S.M. Costinescu, B. Károly, *Efectele deciziilor Curții Constituționale în dinamica aplicării lor (The effects of Constitutional Court decisions in the dynamics of their application)*, in Public Law Magazine no. 10/2012.

[19] CCR dec. no. 727/09.07.2012 published in the Official Gazette of Romania no. 477/12.07.2012.

[20] CCR dec. no. 1018/19.07.2010, published in the Official Gazette of Romania no. 511/22.07.2010.

[21] CCR dec. no. 302/27.03.2012, published in the Official Gazette of Romania no. 361/29.05.2012.

The possibility of repeating the same plea of unconstitutionality, in compliance with the legal conditions regarding its admissibility, can be converted, in the specific plan of constitutional proceedings, into an appeal, with its own physiognomy, the aim and end of this approach being, in reality, the same as that sought in the promotion of an appeal: the reintroduction before the Constitutional Court of a legal wording which it has previously rejected, but with the submission of new aspects likely to lead to a change in that case law".

With regard to compliance by the courts with decisions finding the unconstitutionality of a legal provision, the Constitutional Court noted in its case law that the court of law shall have the jurisdiction to apply the Constitution directly only in the circumstances and on the terms laid down in the decision finding the unconstitutionality[22]. Therefore, the courts of law may directly apply the Constitution only if the Constitutional Court has found a legislative solution to be unconstitutional and has authorised, by that decision, the direct application of constitutional provisions, in the absence of a legal regulation of the legal situation created by the decision upholding the exception of unconstitutionality.

3. Conclusions

Underlining the creative force of the case law, Vladimir Hanga wrote: „The law remains in its essence abstract, but the appreciation of the case law makes it a *living law*, due to the fact that, the judge, understanding the law, taking into consideration the interests of the parties and drawing inspiration from equity, ensures the ultimate purpose of the law: *suum cuique tribuere*"[23].

The compliance with the CCR case law is a desideratum so that the democratic and social rule of law is not just a fundamental principle, with purely theoretical values, but a reality correctly perceived by both public authorities[24], and the citizens.

As the doctrine noted, the binding nature of the CCR decisions is a factor for the stability of the Constitution, as well as for its development. Therefore, „if the multitude of social pressures exerted on the Constitutional Court by way of exceptions of unconstitutionality is a factor disrupting constitutional stability, this is opposed by the decision of the Constitutional Court which has the role of defusing conflict situations by indicating the legal wording on the basis of which civil, criminal or other cases are to be settled by the courts. To the extent that these decisions absorb in their content the transformations that have taken place at social level, they give new meanings to the terms of the Constitution, to the concepts with which it operates, paving the way for its perpetual renewal"[25].

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[22] In this respect, see CCR dec. no. 186/18.11.1999, published in Official Gazette of Romania, Part I, no. 213/16.05.2000, dec. no. 774/10.11.2015, published in the Official Gazette of Romania, Part I, no. 8/06.01.2016, or dec. no. 895/17.12.2015, published in the Official Gazette of Romania, Part I, no. 84/04.02.2016.

[23] V. Hanga, *Dreptul şi tehnica juridică (Law and legal technique)*, Lumina Lex Publishing House, Bucharest, 2000, p. 80.

[24] In what concerns the work of public authorities, in article E.E. Ștefan, *Legalitate şi moralitate în activitatea autorităţilor publice (Legality and morality in the work of public authorities),* in Public Law Magazine no. 4/2017, pp. 95-105.

[25] I. Vida, *Obligativitatea deciziilor Curții Constituționale pentru instanțele judecătorești – factor de stabilitate a Constituției și a practicii judiciare (Binding decisions of the Constitutional Court on the courts - a factor of stability of the Constitution and judicial practice)*, in Pandectele Române no. 3/2004, p. 202.

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