

THE EFFECTS OF THE DECISIONS ISSUED BY THE CONSTITUTIONAL COURT OF ROMANIA

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Abstract

The principle of erga omnes mandatory character of the decisions pronounced by the Constitutional Court is enshrined even through the constitutional text. There were interpretations of the current constitutional text that highlighted the questionable nature of the binding character of the decisions of the Constitutional Court in the hypothesis where the Constitutional Court rejects the exception of unconstitutionality which has as its object the provisions of a normative act. The Constitutional Court confirmed that both the reasoning and the court ruling that are the common body of the Court's decisions produce legal effects erga omnes, consequences that derive from the uniqueness and independence of the constitutional jurisdiction authority.

We consider that the rule is therefore represented by the binding effect of constitutional decisions, as a characteristic of the stability of the Constitution, since these acts have the role of de-tensioning situations by indicating the normative text on the basis of which a civil, criminal or other case of to the common law courts.

Regarding res judicata authority, with strict reference to the characteristic of opposability, we show that it has the meaning that if the unconstitutionality of certain provisions has been established, these provisions cannot be subjected to constitutionality control again. The principle of proportionality originates in German law and is reflected in the jurisprudence of the European Court of Human Rights, the Court of Justice of the European Union and the Constitutional Courts of Europe. The Romanian Constitution, however, expressly enshrines within the provisions of art. 53 paragraph 2 the principle of proportionality, also determining the mandatory conditions to order such a measure. On the one hand, decisions establishing unconstitutionality are directly applied in cases pending before the courts. On the other hand, the Court's jurisprudence confirms the aspect that a provision that has been declared unconstitutional cannot be consecrated again by the legislator, by resuming it in another normative act.

Keywords: *erga omnes mandatory character, the res judicata authority, the presumption of constitutionality of the normative acts in force, the relationship established between the common law judge and the constitutional judge, the dialogue between the legislator and the Constitutional Court.*

The principle of the *erga omnes* obligation of the decisions of the Constitutional Court

In the exercise of its powers, the Constitutional Court issues several categories of acts such as decisions or rulings, each corresponding to the specific powers carried out under the provisions of art. 11 of Law no. 47/1992¹. Those through which the unconstitutionality exceptions regarding laws and ordinances brought before the courts or commercial arbitration are solved, by referring to the provisions of art. 11 letter d) of the aforementioned law are of specific interest.

The principle of *erga omnes* mandatory character of the decisions pronounced by the Constitutional Court is enshrined even through the constitutional text. This effect emerges concretely from the provisions of art. 147 paragraph 4 of the Fundamental Law, which states that 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. This effect enshrined at the constitutional level signifies the fact that decisions affect all legal subjects, an effect produced by normative acts, as opposed to court decisions. We mention this aspect because it is relevant to observe what is the impact of the decisions of the Constitutional Court compared to that produced by a court decision pronounced by the national judge in an ordinary litigation at a comparative level, because in this last hypothesis the judgements produce effects only *inter partes*².

A clarification of the strength of this effect attached to the decisions pronounced by the Constitutional Court took place after the revision of the 2003 Constitution. Thus, in the previous form of the text it was only mentioned that the decisions of the Court are binding and have power only for the future. By interpreting the meaning of the previous regulation, in practice there were countless situations according to which it was considered that the decisions of the Constitutional Court would strictly produce effects between the litigating parties. In order to clarify how this effect was conceived and its power, the Constitutional Court pronounced in plenary Decision no. 1/1995³, whose content even concerns the characteristic obligation of the exercise of constitutionality control. In the reasoning of this decision, a series of arguments and explanations were retained. It is worth mentioning the following aspect: it is no coincidence that the text of the 1991 Constitution states the establishment of the Constitutional Court in Romania, and its role as guarantor of the supremacy of the Constitution is included in art. 1 paragraph (3) from Law no. 47/1992. To ensure this

¹ Law on the organization and operation of the Constitutional Court, Published in the Official Journal of Romania no. 101 of May 22, 1992.

² Decision no. 5 of 2018 published in the Official Gazette, Part I, no. 355 of April 24, 2018 pronounced by the High Court of Cassation and Justice, the panel for resolving some legal issues.

³ Decision published in the Official Gazette of Romania no. 16 of January 26, 1995.

role, the Constitutional Court is defined by law as a constitutional jurisdiction authority in Romania, independent from any other public authority and subject only to the Constitution and its organic law.

Thus, constitutionality control is not a brake on democracy, but a necessary process, as it allows the parliamentary minority and citizens to ensure compliance with the provisions 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.

Next, it was differentiated according to which type of control corresponds to decisions which, according to the provisions of art. 145 para. (2) of the Constitution are mandatory. It was shown⁴ that, if unconstitutionality is found by means of a decision, it has an *erga omnes* character, which means that it has a binding effect of a general nature, so all public authorities, citizens and legal entities under private law are targeted. We therefore observe that the force of a law is given to these decisions pronounced by the Constitutional Court.

At the same time, there were interpretations of the current constitutional text that highlighted the questionable nature of the binding nature of the decisions of the Constitutional Court in the hypothesis where the Constitutional Court rejects the exception of unconstitutionality which has as its object the provisions of a normative act. There were also opinions according to which this type of decisions would not be binding. Although it has been shown that these decisions which found the constitutionality of a certain legal text have an increased impact in terms of the legal order, the Constitutional Court can return to its jurisprudence if necessary and appropriate.

To put an end to the interpretations, the Court established that the provisions of art. 147 paragraph 4 of the Constitution regulate the general binding nature of the decisions of the Constitutional Court and do not distinguish either according to the types of decisions that the Constitutional Court issues, nor according to the content of these decisions, which leads to the conclusion that all decisions issued by the constitutional forum, in their entirety, are generally mandatory⁵.

In addition, the Constitutional Court emphasized the aspect that the binding effect of the Court's decisions towards all legal subjects is attached to both the court ruling and the reasoning on which it is based. Thus, the so-called grounds are "a unitary set of arguments, which presented in a logical sequence make up the legal reasoning on which the pronounced solution is based (...). Therefore, the thesis according to which in the content of a decision of the Court there could be independent grounds of the legal reasoning that converge on the solution rendered cannot be accepted (...),

⁴ Decision no. 1018 of July 19, 2010 of the Constitutional Court published in the Official Gazette of Romania, Part I, no. 511 of July 22, 2010.

⁵ Decision no. 2 of January 2012, published in the Official Gazette of Romania no. 131 of February 23, 2012.

therefore, the Court finds that the authority of *res judicata* and the binding character of the solution are overturned on all reasoning the decision⁶.

The Court's jurisprudence shows the strength of the general binding character of its decisions, a character that cannot be defeated by the process of interpretation and application of the legal provisions carried out by the courts, because, in a state of law all public authorities, must respect the decisions of the Constitutional Court both in the application and in the interpretation of the infraconstitutional norms since they materialize and explain the requirements of the Constitution"⁷.

Over time, there has been a whole series of criticisms of unconstitutionality having as its object the general binding nature of the decisions pronounced by the Constitutional Court through the lens of the alleged violation of free access to justice. However, the Constitutional Court confirmed that both the reasoning and the court ruling that are the common body of the court's decisions⁸ produce legal effects *erga omnes*, consequences that derive from the uniqueness and independence of the constitutional jurisdiction authority⁹. In support of the opinion which says that all decisions belonging to the constitutional forum have attached general binding character, we offer precisely this relevant argument, namely the aspect that the Constitutional Court is characterized by attributes and has specific powers, which are not found even in the case of common law courts, nor in the case of other state authorities.

In another vein, the Court emphasized that the decision rejecting the constitutionality exception is generally binding¹⁰ and has force only for the future. Therefore, pursuant to art. 147 para. (4) of the Constitution, the public authorities involved in the case in which the exception was invoked are obliged to respect the decision in its entirety, i.e. both the provision and the reasoning that substantiated it. The Court detailed that the legal effect of such a public decision is limited exclusively to the procedural framework of the litigation in which the exception of unconstitutionality was raised, being of an *inter partes* nature. This means the following: the same legal text will be able to be brought back for examination before the Constitutional Court by referring to new aspects and constitutional grounds, a situation that could lead to the substantiation and justification in perspective of a distinct solution.

It was also shown that the possibility of reiterating the same exception of unconstitutionality, with compliance with the legal conditions regarding its admissibility, can be converted into the specific plan of constitutional procedures, into a way of appeal with its own physiognomy, the purpose and end of this approach

⁶ Decision no. 392 of June 6, 2017 published in the Official Gazette of Romania, Part I, no. 504 of June 30, 2017.

⁷ Decision no. 454 of July 4, 2018 of the Constitutional Court published in the Official Gazette of Romania no. 836 of October 1, 2018, para. 63.

⁸ Which have the object of establishing the unconstitutionality of a law text.

⁹ Decision no. 302 of March 27, 2012 published in the Official Gazette of Romania no. 361 of May 29, 2012.

¹⁰ E.g. Decree no. 422 of June 17, 2021, published in the Official Gazette of Romania no. 840 of September 2, 2021.

being, in reality, the same as the aimed at the promotion of an appeal, namely the bringing back before the Constitutional Court of a text of law on which it had previously issued rejection solutions, but the invocation of new aspects is likely to determine the change of this jurisprudence¹¹. We believe that constitutional jurisprudence is characterized by dynamism and that, although stability is an important element, since in the last decade there have been numerous legislative changes, it is necessary that all these provisions from the adopted or amended normative acts are functional in practice.

Otherwise, only through the institution of the exception of unconstitutionality as a form of *a posteriori* control, these provisions could still be checked and possibly removed by finding a vice, a lack of conformity with the constitutional principles. Subjecting the legal provision to a repeated test of constitutionality can be reiterated under fairly strict conditions, when absolutely new elements are invoked, which would have the power to change the jurisprudence of the constitutional forum.

Through Decision no. 1606 of December 20, 2011¹², it was held that the regulation by means of the law of the effects produced by a previous decision by which an exception of unconstitutionality was admitted may not affect the validity of legal acts that acquired the definitive character prior to the publication of the Court's decision. Thus, the presumption of constitutionality of the legal rule-regarding the period before the publication of the Court's act by which the unconstitutionality of a legal provision was found- is exactly respected.

We consider that the rule is therefore represented by the binding effect of constitutional decisions, as a characteristic of stability of the Constitution, since these acts have the role of de-tensioning situations by indicating the normative text on the basis of which a civil, criminal or other type of cases by common law courts.

On the other hand, the binding character attached to a decision by which the constitutional forum rejected an exception of unconstitutionality constitutes a cause of inadmissibility regarding the formulation of a new exception, regulated by paragraph 3 of the content of art. 29 of Law no. 47/1992¹³. However, the same normative provision may be subjected to a new analysis by the constitutional forum, in the exceptional case where the author invokes the violation of new constitutional grounds and principles or refers to new aspects, which were not verified before the first constitutionality analysis.

In the assumption of admitting the formulated exceptions of unconstitutionality, the decisive force of the pronounced decisions acquires one specific to the law. Although the invoked exception was analyzed in a specific case, the court ruling of the

¹¹ Idem.

¹² Published in the Official Monitor of Romania no. 106 of February 9, 2012.

¹³ Decision no. 1777 of June 25, 2015 pronounced in appeal by the Second Civil Section of the High Court of Cassation and Justice, having as its object the finding of absolute nullity of the contractual clause.

judgement acquires a general application value. Thus, once the unconstitutionality of a provision has been verified and established, it is no longer necessary to initiate a new dialogue between the judge of the merits and the constitutional judge or to restart a new analysis of the conformity of the rule in a new litigation. Practically, the solution of the Constitutional Court becomes the letter of the law, and the recipients of this effect are not only litigants, but also common law courts, on the one hand, and public authorities, on the other.

From another point of view, we shall point out the *ex nunc* nature of the Court's decisions effects. As a general judicial rule, the Court's decisions produce effects only for the future, in accordance with the principle of legal certainty. This means that they cannot affect legal relationships definitively established prior to their publication. However, the Court may establish some derogations, but not directly from this principle, but regarding some indirect effects, as which would be the fate of procedural acts that were born before the moment of the publishing of a certain Court's decision.

If, in the opinion of some courts, prior to Decision no. 685/2018¹⁴, there were still questions related to the applicability of the effects of the Constitutional Court's decisions with regard to acts performed prior to the issuing of the Court's decision in the cases pending before the courts, we believe that after the issuing of this decision, the contrary may no longer be argued. It becomes extremely clear that the intention of the Court from the very beginning was to remove from the legal circuit both the norm and the effects of its violation, in the pending trials, without distinguishing according to the moment of performance of the act. In summary, it follows from this decision that the effects of absolute nullity arising from failure to comply with material competence also occur with regard to acts drawn up prior to the finding of the unconstitutionality of the legal norm on the basis of which the acts were performed. In addition, through Decision no. 454/4 July 2018¹⁵, the Constitutional Court presents again the scope of the effects of its decisions, this time regarding a text from the Code of Civil Procedure. In essence, the Court declares art. 27 of the Code of Civil Procedure¹⁶ as unconstitutional, clearly establishing that the effects of the decision issued shall be produced for the future and in pending cases¹⁷. However, it is stated

¹⁴ Published in the Official Gazette no. 1021 of November 29, 2018

¹⁵ Published in the Official Gazette no. 836 of October 1, 2018

¹⁶ Law no. 134 of 1 July 2010 of the Code of Civil Procedure published in the Official Gazette no. 485 of 15 July 2010

¹⁷ Para. 60 from Decision no. 454/8 July 2018 regarding the aspects stated above, the Court establishes the following: "60. The Court finds that, by Decision no. 52 of 18 June 2018*, not yet published at the date of publication of this decision in the Official Gazette of Romania, Part I, the High Court of Cassation and Justice — Panel for resolving legal issues established that "in the interpretation and application of the provisions of art. 27 of the Code of Civil Procedure, with reference to art. 147 paragraph (4) of the Constitution of Romania, the effects of the Constitutional Court Decision no. 369 of 30 May 2017 shall apply to court decisions rendered after its publication in the Official Gazette of Romania, in disputes valued in money up to 1,000,000 lei inclusive, initiated after the publication of the decision (20 July 2017)". Therefore, the High Court of Cassation and Justice conditioned the

through the same act, that art. 147 para. (4) of the Constitution is, in terms of procedural rules, immediately applicable, having a sanctioning nature. Therefore, in interpreting this constitutional text in relation to the civil procedure rules, the Court finds that it applies both to pending situations and to those that will arise in the future, the scope of application of art. 147 para. (4) of the Constitution cannot be conditioned by the fact that the civil proceedings were initiated before or after the publication of the Constitutional Court Decision no. 369 of 30 May 2017¹⁸. Furthermore, the Court notes that, in its jurisdictional practice, it consistently specifies the constitutional effects of its decisions¹⁹, meaning that it expressly establishes its constitutional effects on pending cases. Given the constitutional dimension of the Constitutional Court's action, it follows that the courts cannot remove the effects of the Constitutional Court's decision expressly indicated in its body, because it would violate the exclusive jurisdiction of the Constitutional Court, and instead they are obliged to apply them accordingly in the cases they are entrusted with.

The *res judicata* authority

This effect is also attached to the remaining final court decisions, which become an objective reality, so they can no longer be appealed. This principle of *res judicata* authority is outlined both in the substantive civil law and in the procedural criminal law, with the distinction that within the civil procedural norms, it is expressly stated. A distinction between the authority of *res judicata* and the power of *res judicata* is made. The latter considers the fact that the judge will take into account what another judge has already ruled, following the settlement of a dispute, because he cannot abstract from a decision definitive, of what has already been decided. Moreover, the High Court of Cassation and Justice decided that there is an important difference between the exception of *res judicata* authority and the power of *res judicata*.

Thus, the condition of application of *res judicata* authority assumes the identity of actions (parties, object and legal cause) which stops the repetition of the judgment, and the power, which actually represents a presumption of *res judicata*, imposes consistency in the judgment²⁰. Therefore, in this last hypothesis, a legal situation or a right that was ascertained by a court decision must not be contradicted by another decision, an act belonging to another judge.

application of the Constitutional Court Decision on the initiation of the civil proceedings after its publication.

¹⁸ Published in the Official Gazette no. 582 of July 20, 2017

¹⁹ See, for example, Decision no. 895 of 17 December 2015, published in the Official Gazette of Romania, Part I, no. 84 of 4 February 2015, paragraph 28, or Decision no. 51 of 16 February 2016, published in the Official Gazette of Romania, Part I, no. 190 of 14 March 2016, paragraph 52.

²⁰ Decision no. 1777 of June 25, 2015 pronounced in appeal by the Second Civil Section of the High Court of Cassation and Justice, having as its object the finding of absolute nullity of the contractual clause.

The *res judicata* authority is also a characteristic of the decisions issued by the constitutional forum. Right from the moment when a decision which established that a certain provision is non-compliant from the perspective of constitutionality is issued, its content becomes opposable to the Constitutional Court. At the same time, other public authorities' decisions are only enforceable from the moment they are published in the Official Gazette, at which point they become binding on absolutely any third party. Therefore, no one will be able to continue using a provision whose unconstitutionality was found by the Court in a litigation. With strict reference to the characteristic of opposability, we show that it has the meaning that if the unconstitutionality of certain provisions has been established, these provisions cannot be subjected to constitutionality control again. As far as the issuer of these decisions is concerned, the aspect that the previous decision has not yet been published is not relevant, the solution by which the unconstitutionality of a certain legal text was found to be opposable to the Court²¹. Moreover, if such an exception were subjected to a new analysis and would end up on the role of the constitutional judge, passing the filter of the substantive judge, the constitutional forum would reject the exception, as having become inadmissible, if in the meantime it has ruled on the same provisions, before that the decision was published, therefore known to the *a quo* judge.

Naturally, the act issued by the Court becomes opposable to third parties, including public authorities, only from the moment of its publication. Regardless of his role in society or in relations with citizens, a third party to the litigation-following which the unconstitutionality of a certain provision was found- does not have the obligation and, as a rule, neither the possibility to take cognizance of the content of the Court's decisions before they are published. Even in the hypothesis in which a supposed function to prevent the impairment of subjective rights would be activated, when a certain public authority would perform increased diligence and come to know the solution pronounced by the Constitutional Court, it would not have a legal basis for applying the decision prior to its publication. This effect takes place due to the fact that the provisions that are subject to control benefit from the presumption of constitutionality for the entire period between the moment of the pronouncement and the publication of the decision of the Constitutional Court²².

The Court notes that, in accordance with its jurisprudence²³, the power of *res judicata* that accompanies the jurisdictional act, therefore its decisions, is attached not only to the Court ruling, but also to the reasoning on which it is based. Thus, the

²¹ Decision no. 1488* of the 11th of November 2010, published in the Official Gazette of Romania, Part I, no. 884 from 29 decembrie 2010.

²² T. Toader, M. Safta, "Admissibility Guide to the Constitutional Court of Romania", 2nd edition, Hamangiu Publishing House, 2020.

²³ For example, the Decision of the Plenary of the Constitutional Court no. 1/1995 regarding the binding nature of its decisions issued within the framework of the constitutionality control.

Court holds that both the reasoning and the Court ruling of its decisions are generally binding and are imposed with the same force on all legal subjects²⁴.

As a direct consequence, both the Parliament and the Government, respectively the public authorities and institutions must respect, in applying the criticized law, everything that was established by the Constitutional Court in the reasoning and the court ruling of this decision, since the reasoning represent the arguments in favour of the solution in the court ruling and make common body with the latter every time.

An exception of repeated unconstitutionality is inadmissible to the extent that the conditions provided by art. 138 para. (1) C. proc. civil regarding the *res judicata* authority. Moreover, the Court, through its jurisprudence²⁵, has established that the conditions of *res judicata* authority are met when a party raises an exception of unconstitutionality identical to the appeal, i.e. if it concerns exactly the same legal provisions and with the same motivation as the which he had raised before the substantive court, an exception which was submitted to the analysis of the Constitutional Court and rejected by it. Thus, there is a triple identity, of object, cause and parties both within the exception raised before the first instance and the exception raised on appeal. Taking into account by referring to the content of the provisions of art. 147 para. (4) of the Constitution, according to which the final decisions of the Constitutional Court are generally binding, the party that invoked an exception cannot reiterate it, because the first decision acquires the authority of *res judicata*, which makes the exception inadmissible.

At the same time, by Decision no. 213 of March 31, 2015²⁶, the constitutional forum rejected the exception of unconstitutionality of the provisions of Law no. 63/2011²⁷ as unfounded and ruled that the decision rendered has the authority of a *res judicata* regarding the constitutionality issue resolved for the parties involved in the present litigation. The Court's reasoning was based on the fact that the exception of unconstitutionality analyzed by it was formulated by the same party [...], within the same trial- even if it was raised in the appeal, its object being the provisions of Law no. 63/2011, and the cause on which it is based is identical, considering that the justification for the exception refers to the provisions of art. 1 paragraph (5) of the Constitution. Likewise, the argument regarding the alleged contradiction between the object of the exception and the mentioned constitutional text is also similar. Under these conditions, it is obvious that Decision no. 213 of March 31, 2015 benefits from

²⁴ The penultimate paragraph of the content of Decision no. 694 of May 20, 2010 on the exception of unconstitutionality of the provisions of art. I point 184 of Law no. 356/2006 for the amendment and completion of the Code of Criminal Procedure, as well as for the amendment of other laws, regarding the amendment of the provisions of art. 385⁹ para. 1 point 12 of the Criminal Procedure Code.

²⁵ Decision no. 81 of March 8, 2001 published in the Official Gazette of Romania no. 176 of April 6, 2001.

²⁶ Published in the Official Gazette of Romania, Part I, no. 361 of May 26, 2015.

²⁷ Text published in the Official Gazette, Part I, No. 323 of 10 May 2011.

In force from 13 May 2011 to 31 July 2016, repealed by Emergency Ordinance 20/2016.

the authority of *res judicata* in relation to the parties in the process - effects *inter partes litigantes*."

In addition, by Decision no. 169 of November 2, 1999²⁸ the Court emphasized that "the same parties and for the same reasons cannot reiterate the objection of unconstitutionality, because it would violate the authority of the *res judicata*. However, in another trial, the exception can be reiterated, thus offering the possibility of the Constitutional Court reanalyzing the same issue of unconstitutionality, following the invocation of new grounds or the intervention of other elements. The explanation of such a situation consists in the fact that the same criticism of unconstitutionality can lead to the admission of the notification of unconstitutionality if the factual and legal circumstances of the case demonstrate the existence of some new elements compared to the initial situation when the Court found the constitutionality of the respective legal provisions.

A distinct hypothesis is outlined if the exception of unconstitutionality was rejected by the Court on the basis of inadmissibility. The same exception can be raised again before the Court, in compliance with the conditions of admissibility. For example, an illustrative example would be the fact that at the time of the proceedings before the substantive court, the connection with the settlement of the case cannot be maintained - in that procedural phase; as a consequence, the exception would be inadmissible. But, at the stage where the trial reaches that procedural phase, the same repeated exception becomes admissible.

The specific effects produced in relation to the judge of the law case

Decisions establishing unconstitutionality are directly applied in cases pending before the courts. At the same time, with regard to disputes settled definitively, they are applied if the extraordinary appeal of review is used, in the hypothesis that the admission decision was pronounced as a consequence of invoking the exception of unconstitutionality in the respective case. It must be taken into account that the decision by which the Constitutional Court admitted an exception cannot be applied in definitively solved cases until the moment of its publication in the Official Gazette, because for the entire period of activity of the legal rule, it is presumed to have constitutional character. The decision applies instead to all lawsuits pending in the courts at the time the decision is published. Moreover, it is stated in the Court's jurisprudence that its decisions will always be applied in the litigation in which the exception was formulated, regardless of whether or not it was resolved by a final decision²⁹.

Regarding the admissibility of the revision case expressly regulated, by means of Decision no. 1106 of September 22, 2010³⁰, the Court held that it "resides in the very

²⁸ Published in the Official Gazette of Romania, Part I, no. 151 of April 12, 2000.

²⁹ Benke Károly, Mihaela Senia Costinescu, "The Constitutional control in Romania", Hamangiu Publishing House, 2020.

³⁰ Published in the Official Gazette of Romania, Part I, no. 672 of October 4, 2010.

existence of a decision of the Constitutional Court by which an exception of unconstitutionality invoked by a party in the case settled by the final decision subject to review is admitted", but the review request will be approved only in the hypothesis where "the legal provision declared unconstitutional had a decisive impact on the decision rendered in the case".

Through Decision no. 2010 of April 9, 2019³¹ it was established that the judge of the case has the task of applying the effects of the Constitutional Court's decisions according to the *facta praeterita/pendentia/futura*, if the court's jurisdiction has not been established and in the meantime that specific legal provision which establishes the jurisdiction of the common law court has been declared unconstitutional. Regarding the relationship established between the common law judge and the constitutional judge, by admitting an exception of unconstitutionality having as its object certain legal provisions, it acquires another dimension that involves the authority of the Court over the substantive judge. Of course, the Court is entitled to apply the rule in force after carrying out the constitutionality control to the state of facts in the concrete case. Like all subjects of law, the courts must comply with the decisions handed down by the Court. However, in the hypothesis that the solution given by the Court through a decision and published in the Official Gazette of Romania would be mistakenly ignored by the *a quo* judge, we note that a case of illegality of the common law courts' is not regulated.

Referring to the provisions of art. 488 para. (1) Civil Procedure Code³² we note that that as there is no ground for appeal in this regard, there is no reason for cancellation regarding this matter. In the doctrine, in an opinion³³ it was shown that there is the possibility of "exceeding the attributions of the judicial power" being invoked as a reason for annulment of the court's decision in the situation where the judge of the case would have omitted to apply the decision of the Constitutional Court. On the other hand, by Law no. 24/2012³⁴, a new disciplinary offense was introduced in the field of misconduct in the exercise of official duties, which has the non-compliance with the decisions of the Constitutional Court as its object. In our opinion, punishing the magistrate who issued the judgment on the merits of the case is ineffective, considering the absence at the same time of a reason for illegality to sanction the vice of not applying the solution pronounced by the Court. Even the Constitutional Court, through the reasoning of Decision 2/2012³⁵, showed that "disciplinary responsibility

³¹ Published in the Official Gazette of Romania, Part I, no. 800 of October 2, 2019.

³² Law no. 134 of July 1, 2010 regarding the Code of Civil Procedure published in Official Gazette no. 545 of August 3, 2012

³³ I. Deleanu, S. Deleanu, „Jurisprudence and jurisprudential revival. Essay”, Universul Juridic Publishing House, Bucharest, 2013.

³⁴ Law for the amendment and completion of Law no. 303/2004 regarding the status of judges and prosecutors and Law no. 317/2004 regarding the Superior Council of the Magistracy, published in the Official Gazette of Romania, Part I, no. 51 of January 23, 2012.

³⁵ Published in the Official Monitor of Romania, Part I, no. 131 of February 23, 2012.

can be engaged in completely different conditions than those provided by law for the promotion of an appeal".

Often, the Constitutional Court exceeds its attribute of carrying out a simple control with the object of verifying the conformity of certain legal texts with the provisions of the Fundamental Law. In addition to confirming or denying the conformity of certain legal provisions with the Constitution through a series of decisions, the Constitutional Court draws a series of rules and establishes some concrete principles, through which the competences belonging to public authorities are either delimited, or real solutions regarding how of interpretation of the Constitution are offered. Moreover, there were situations in which the Constitutional Court carried out a "correction" of certain legislative omissions. Therefore, an evolution of the Court's jurisprudence regarding the specific effects of the issued decisions and in particular the role played by them in the phenomenon of the constitutionalization of law is materializing. By interpretative decisions we mean all of the Court's decisions that also include other elements compared to the simple declaration of the constitutional or non-constitutional character of the criticized norms. On the other hand, any act pronounced by the Court is based on a legal interpretation, but "not every decision of the Constitutional Court constitutes an interpretative decision"³⁶.

Unlike simple decisions, decisions with an interpretative effect are issued when the Court encounters some "complex and often novel constitutional problems"³⁷. This type of decisions leads to "saving" the text of the law in a certain meaning, which is preferable to the creation of a legislative vacuum. We note that the effects of decisions of this type overlap the general effects produced by all types of decisions belonging to the Court, so that they are also generally binding in their entirety. What is specific, however, is their result, namely the fact that in the hypothesis in which the unconstitutionality of the law is found in a certain interpretation, the legal text does not cease its validity and applicability, but it continues its existence in the legislative fund; only the interpretation that contravenes the Fundamental Law is removed.

On the one hand, there are a series of decisions of the Court through which the constitutionality of the legal norms is ascertained making them the object of criticism, as far as they are interpreted in a certain way. By way of example, we refer to Decision no. 731 of July 10, 2012³⁸, in which it was found that the Law amending art. 10 of Law no. 3/2000³⁹ on the organization and conduct of the referendum is constitutional if it ensures the participation in the referendum of at least half plus one of the number of persons registered in the permanent electoral lists. On the other hand, certain decisions have been issued by which the unconstitutionality of the criticized

³⁶ T. Toader, M. Safta, "Dialogue of constitutional judges", Universul Juridic Publishing House, Bucharest, 2015.

³⁷ I. Deleanu, "Constitutional institutions and procedures", C. H. Beck Publishing House, Bucharest, 2006.

³⁸ Published in the Official Monitor of Romania, Part I, no. 478 of July 12, 2012.

³⁹ text published in the Official Gazette, Part I, No. 84 of February 24, 2000.

legal norms has been found, when they are interpreted in a certain way. We indicate Decision no. 482 of November 9, 2004⁴⁰ as an example, by which it was noted that "the provisions of art. 362 para. (1) lit. d) from the Criminal Procedure Code are unconstitutional if they do not allow the civil party and the civilly responsible party⁴¹ to exercise the ordinary avenue of appeal regarding the criminal side of the trial".

The effects produced in relation to the legislative power

The Court's jurisprudence⁴² confirms the aspect that a provision that has been declared unconstitutional cannot be consacrated again by the legislator, by resuming it in another normative act. Moreover, as it appears from the text of art. 147 para. (1) and (2) of the Constitution, the obligation to reconcile the non-constitutional provisions with the provisions of the Constitution is established, without making a distinction considering the nature or time of the intervention of the constitutionality control.

Instead, the Constitutional Court held that through the decision of the High Court of Cassation and Justice, "there are no consequences on the normative existence in the legal order of the provision subject to control, but it is only established, through interpretation, a single constitutional meaning of art. 5 Criminal Code"⁴³. At the same time, by Decision no. 265 of May 6, 2014⁴⁴, it was noted that "the provisions of art. 5 of the Criminal Code are constitutional to the extent that they do not allow combining the provisions from successive laws in the establishment and application of the more favorable criminal law".

The legislator's obligation related to the decisions of the Constitutional Court

At the same time, as regards the legislative authority, whether it is the Parliament or the Government, according to the consistent jurisprudence of both the Constitutional Court and the European Court of Human Rights, it has the obligation to promulgate normative acts that respect a number of characteristics: predictability, clarity and predictability. The European Court of Human Rights has ruled numerous times through its judgments that "a rule is predictable only when it is drafted with sufficient precision, in such a way as to allow any person - who, if necessary, can call on specialist advice - to correct his conduct"⁴⁵.

⁴⁰ Published in the Official Gazette of Romania, Part I, no. 1200 of December 15, 2004.

⁴¹ Then known as "person", not "party".

⁴² Decision no. 1615 of December 20, 2011 published in the Official Gazette of Romania no. 99 of February 8, 2012.

⁴³ Decision no. 418 of June 19, 2018 published in the Official Gazette of Romania no. 625 of July 19, 2018.

⁴⁴ Published in the Official Monitor of Romania, Part I, no. 372 of May 20, 2014.

⁴⁵ The decision handed down in the case of Rotaru against Romania on May 4, 2000 and published in the Official Gazette of Romania, no. 19 of January 11, 2001.

Moreover, "the law must be, at the same time, accessible and predictable"⁴⁶.

The text of article 147 of the Fundamental Law distinguishes according to the nature of the prerogative in the exercise of which was pronounced the decision by which the unconstitutionality was found. Thus, regarding the unconstitutionality of a law, before it was promulgated, by reference to the provisions of art. 146 lit. a) of the Constitution, the Parliament has the obligation to re-examine those provisions and put them in perfect agreement with the Court's decision. For its part, the Constitutional Court has, in this case, the obligation to send the decision by which the unconstitutionality of the normative act was found both to each president of the Parliament Chambers and to the Prime Minister, the purpose being opening the procedure for the re-examination of the law, so that all relevant provisions in the field are taken into consideration⁴⁷.

What is of interest considering the subject matter addressed in our paper, is the way in which the relations between the Constitutional Court and the legislative power are carried out regarding the dialogue between them and the application of the decisions pronounced by the Court.

Within the constitutional provisions, there are no regulated terms in which it has to eliminate the vices of unconstitutionality found by the court, since as it was held in a doctrinal opinion, he cannot be obliged to legislate⁴⁸.

Through Decision no. 14/2010⁴⁹, some provisions of the rules of the Chamber of Deputies were amended, so that some norms and deadlines regarding the procedure to be followed were inserted, in the event that the Court finds that certain legal provisions do not comply with the text of the Constitution, regardless of whether we are talking about an *a priori* or *a posteriori* control.

Since we are talking about laws or ordinances already in force, part of the Romanian normative system, in the situation of constitutionality control carried out *a posteriori*, either certain provisions from their content, or the normative acts in their entirety, may still produce legal effects, but only at a distance of 45 days from the moment of publication of the act pronounced by the Court. During this period of time the issuer of the law or of the ordinance has to fulfill the obligation to put into agreement the provisions considered to be unconstitutional with the provisions of the constitution. For as long as the decision produces its effects from the moment of its publication in the Official Gazette, during the entire 45-day period, the respective provisions that have been found to be inconsistent with the constitutional text, are legal. In this situation, the decision by which the unconstitutionality of ordinances or a

⁴⁶ Sunday Times v United Kingdom judgment delivered on 26 April 1979.

⁴⁷ We refer both to the provisions of art. 147 paragraph 2 of the text of the fundamental law, as well as art. 18 paragraph 3 of Law no. 47/1992, on the one hand, on the other hand to the bicameral regulations of the Parliament.

⁴⁸ T. Draganu, "The legal effects of the decisions of the Constitutional Court in the light of the provisions of the revised Constitution", in RDP no. 1/2004.

⁴⁹ Published in the Official Gazette of Romania, Part I, no. 397 of June 15, 2010.

certain provision of a law or ordinance was found is communicated to each of the two Chambers of the Parliament, the Government of the public authorities involved, if applicable. The communication is made to the latter exclusively for informational purposes.

We note that there is no express sanction for the inactivity of the Parliament or the Government after exceeding the 45 days. It is only mentioned that, after its expiration, the text declared to be unconstitutional ceases to produce its effects.

The lack of reaction of the primary or delegated legislator in the way of amending the provisions declared unconstitutional and bringing them into agreement with the text of the Constitution, according to the decision pronounced by the constitutional forum, depends exclusively on the legislator. Neither the Constitutional Court, nor other authority can force Parliament to legislate. Likewise, there is no other body vested with the attribute of amending or supplementing the norms that have been subject to constitutionality control. Thus, the Constitutional Court cannot replace the legislator, just as it cannot replace common law courts, in the interpretation or unitary application of the law⁵⁰.

Unfortunately, there have also been situations where the same flaw of unconstitutionality was taken up in a new normative act by the Parliament, and the Court successively found its unconstitutionality. We observe, for example, the content of Decision no. 1018/2020⁵¹, by which the legislator held that the existence of norms contrary to the reasoning and the operative part of a Constitutional Court's decision, which tends to preserve the legislative solutions affected by the defects of unconstitutionality, violates the Fundamental Law. The Court further showed that in a state of law the public authorities do not enjoy any autonomy in relation to the law, the Constitution establishing through art. 16 para. (2) that "no one is above the law", and in the content of art. 1 paragraph (5) that respect for the Constitution, its supremacy and the laws "is mandatory".

Therefore, we consider that a legislative intervention would be advisable. The goal would be regulating the implementation of the decisions issued by the Constitutional Court and at the same time of certain express sanctions, which would be applied to the legislative power, in case of non-compliance with the content of the acts of the constitutional forum.

Conclusions

The effects produced by decisions of the Constitutional Court are various and important. They may be perceived not only as legal effects, but also as guarding human rights and the superior and unique position of the Constitution.

⁵⁰ Tudorel Toader, Marieta Safta, "Dialogue of constitutional judges", Legal Universe Publishing House, Bucharest, 2015.

⁵¹ Published in the Official Gazette of Romania, Part I, no. 511 of July 22, 2010.

First of all, the Court's specific acts give birth to the obligation to comply with their content in charge of all citizens, not only those who are subject to the constitutional control within a trial. Moreover, all public authorities – Parliament, Government, courts, administrative authorities, public institutions and other public law entities – are obliged to comply with and apply the decisions of the Constitutional Court. This obligation includes not only compliance with the operative part of the decision (the decision itself), but also with its considerations (motivation), which constitute the legal basis of the solution. For example, in Decision no. 1/1995⁵², the Constitutional Court emphasized that state authorities have the obligation to eliminate any norms or practices contrary to the decisions of the Court.

Regarding *erga omnes* effects, we must point out that decisions of the Constitutional Court produce effects on all legal subjects, not only on the parties involved in the disputes in which an exception of unconstitutionality was invoked, as it was stated previously. By Decision no. 126/2022⁵³, the Court clarified that the effects of its decisions extend also to persons who were not parties to the proceedings that led to their issuance.

On the other hand, national courts are obliged to take into account the decisions of the Constitutional Court in resolving pending disputes. If a law has been declared unconstitutional, it can no longer be applied. By Decision no. 874/2010⁵⁴, the Court ruled that any judicial act issued in disregard of a decision of unconstitutionality is null and void.

Meanwhile, there are specific effects that raise only for the legislative body, either the Parliament, either the Government when it takes over certain lawmaking powers. Thus, the Parliament is obliged to amend or repeal normative acts declared unconstitutional within the period provided for by law (usually 45 days). In the absence of legislative intervention, the normative act ceases to produce legal effects. The Government, in the exercise of its normative powers, is also obliged to comply with the decisions of the Court. For example, Decision no. 390/2021⁵⁵ required the Government to review the tax legislation in order to align it with the constitutional principles established by the Court.

The Constitutional Court acts as an arbitrator, preventing deviations from constitutional principles. Through its decisions, the Court can block legislative initiatives or administrative acts that contravene the Constitution. In addition, it has a major role in strengthening the rule of law. By protecting constitutional principles, the Court contributes to democratic stability and the protection of fundamental rights.

Not least, we emphasize the effects on fundamental rights. Since the Constitutional Court may declare unconstitutional laws that abusively restrict citizens' rights, it helps

⁵² Published in the Official Gazette no. 16 of January 26, 1995.

⁵³ Published in the Official Gazette no. 134 of February 9, 2022.

⁵⁴ Published in the Official Gazette no. 433 of June 28, 2010.

⁵⁵ Published in the Official Gazette no. 612 of June 22, 2021.

a lot to protect human rights and freedoms. Essentially, its decisions help define the boundaries between individual freedoms and the public interest, providing a framework for balancing them. Moreover, by controlling constitutionality, the constitutional form ensures that the state does not exceed the limits imposed by the Constitution in its relationship with citizens.

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