DEVELOPMENTS IN THE CONSTITUTIONAL REVIEW. CONSTITUTIONAL COURT BETWEEN THE STATUS OF NEGATIVE LEGISLATOR AND THE STATUS OF POSITIVE CO-LEGISLATOR

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Abstract

The study wants to emphasize that Constitutional Courts belonging to the European model depart from their traditional role as "negative legislator" – which refers to the effect of their acts consisting in removal from the legal system of those rules contrary to the Basic Law -, becoming, to a certain extent, a "positive legislator". Official interpreters of the Constitution, Constitutional Courts assume, sometimes, a role of co-legislators, creating provisions they deduct from the Constitution - when controlling the absence of legislation or legislative omissions -, and revealing the content of constitutional and even infraconstitutional rules accordingly with the Constitution in their case-law, whose effects are nothing but specific forms of „impulse" or „coercion" of the legislator to proceed in a certain sense, and whose continuous development guides the evolution of the entire legal system. Case – law selected presents ways in which the Constitutional Court of Romania is associated to law-making activity. Without minimizing in any way its traditional role as "negative legislator", the study refers mainly to acts and situations that give expression to the creative role of the Constitutional Court of Romania.

Key words: *constitutional review, negative legislator, positive legislator, constitutional loyalty, rule of law, effects of the decisions of the Constitutional Court*

JEL Classification: *K10*

I. Introduction

The acts delivered by Courts (Tribunals, Councils) in exercising their duties have a specific legal regime determined, on the one hand, by the status of these authorities and, on the other hand, by the fact that the effects produced by these acts are enshrined in the Basic Laws of States. This study refers to the European model of constitutional review that entrusts a specially empowered body with this type of review.

The Constitutional Courts belonging to that model are not courts of law in the strict sense of the concept, they do not fall into any of the three traditional powers - legislative, executive and judiciary but, as the Romanian Constitutional Court ruled in one of its decisions[2], "*support the smooth operation of these powers, within the constitutional relationships of separation, cooperation and mutual control*". This position of the bodies of constitutional jurisdiction is legitimized, in fact, even by these powers - involved in the procedure for appointing constitutional judges - powers which, in turn, are chosen by the electorate[3]. It is noted in this connection that, in States that have opted for the European model of review of constitutionality of laws, the regulations of reference – the Constitutions, respectively the laws on the organisation and functioning of the Constitutional Courts /Tribunals - provide that judges are appointed by representatives of the highest authorities in the State, usually political bodies par excellence[4].

In Romania, pursuant Article 142 paragraph (1) of the Constitution, the Constitutional Court *"is the guarantor for the supremacy of the Constitution"*, and, pursuant Article 1(2) of Law 47/1992 on the organisation and functioning of the Constitutional Court[5], is „*the sole authority of constitutional jurisdiction*". In exercising the powers under the Constitution and its

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[2]Decision 1/2011 on the referral of unconstitutionality of National Education Law, Official Gazette, Part I, no.135 of 23 February 2011

[3]see IoanVida, *Constitutional Court of Romania, Politics justice or justice politics*, 45 (Official Gazette, Bucharest, 2011)

[4]M. Safta, *Garanties de l'indépendance des juges constitutionnels dans les pays de l'Union Européenne*, Bulletin of the Central European Academy of Sciences, Letters and Arts no.2/2011

[5]"Monitorul oficial al României" (Official Gazette of Romania), Part I, no.807 of 3 December 2010

organic law, the Constitutional Court carries out also a judicial activity, and the procedures used in carrying out its duties have largely the characteristics of judicial proceedings.

In exercising its duties, the Constitutional Court of Romania can deliver the following acts: decisions, rulings or advisory opinions, accordingly, pursuant the distinctions set forth in Article 11 of Law 47/1992. Of these, the Constitution only refers to decisions and advisory opinions, while rulings are nominated only by Law 47/1992, which awards them the same effect as the one enshrined by the Basic Law in case of decisions[6]. According to Article 147 paragraph (4) of the Constitution of Romania, "*Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. From their publication, decisions shall be generally binding and take effect only for the future."* Given that the generally binding nature of this court's decisions is constitutionally enshrined, these decisions apply to all subject of law, just as the normative acts, unlike court judgements, which produce *inter partes litigants* effects[7].

Similarly, in Poland and Serbia, decisions of Constitutional Courts have generally binding effect. In Germany, an *erga omnes* effect is fully established in case of abstract and concrete constitutional review of laws, as well as of individual complaints of unconstitutionality aimed at normative acts. The force of law is attributed to these decisions. Likewise, in Austria, decisions delivered within the constitutional review exercised on normative acts have *erga omnes* effects.[8]

Given the aforementioned, even if the acts of Constitutional Courts are generically described as "case-law" a common concept used to describe the totality of judgments delivered by courts at all levels, a distinction must be made in relation to their value as source of law[9]. It was stated[10] in that respect, with reference to the role of constitutional jurisdiction bodies and the effects of acts delivered by the same, that, by their case-law, ”*have determined a rearrangement of traditional positions occupied by the time of their emergence by other judicial and political agents. In these circumstances,* ***the legislator does no longer hold the monopoly over the formation of national will. The classical concept that the law is the work of Parliament is now obsolete. "***

This is because, in exercising their powers, Constitutional Courts do more than simply a certification that the disputed legal provisions are or aren't in accordance with the Constitution. In stating the grounds for the acts delivered, the Courts establish principles and rules, delimitate powers of public authorities, give guidance and solution in relation to the interpretation of both the Constitution and the infraconstitutional legislation[11], and even ”repair”, in accordance with the constitutional norms, legislative omissions.

Thus, Constitutional Courts belonging to the European model depart more and more from their traditional role as ”*negative legislator*” – which refers to the effect of their acts consisting in removal from the legal system of those rules contrary to the Basic Law - becoming, to a certain extent, a ”*positive legislator",* official interpreter of the Constitution, revealing the content of constitutional and even infraconstitutional rules in their case-law, whose effects «are nothing but

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[6]according to expert opinions in doctrine, in this way, Law 47/1992 would add to the Constitution, since it provides that also rulings are acts of the Court, although such are not nominated by constitutional provisions - see *Constitutionof Romania - Comment on articles*, coordinators Ioan. Muraru, Elena SiminaTănăsescu, 1419 (CH Beck Publishing House, Bucharest, 2008)

[7]this category does not include the decisions of the High Court of Cassation and Justice, issued following the resolution of appeals in the interest of law, which have a separate legal regime

[8]in detail, www.ccr.ro - the XVth Congress of European Constitutional Courts, General Report, V.Z. Puskas, Benke Karoly, *Enforcement of Constitutional Court Decisions*

[9]in the Romanian law system, courts' case-law is not a creative source of law but it is, as stressed by some authors (Ion Deleanu, *Judges Dialogue*, Romanian Journal of Case-Law, no.1/2012, p.25) - «"*normative force" within the meaning of this phrase attributed to "guide", the "model" the "reference", the "benchmark" for legal practice, doctrine and legislator*»- see the reference to C. Thibierge et alii, *La force normative Naissance d un concept*, LGDJ, Bruylant, 2009

[10]Claudia Gilia, *The rule of law theory,* 272, (Ch. Beck Publishing House, Bucharest 2007)

[11]e.g. Constitutional Court of Austria, Estonia, Lithuania, Romania, Hungary,

specific forms of „impulse" or „coercion" of the legislator to proceed in a certain sense»[12], and whose continuous development guides the evolution of the entire legal system.[13]The powers entrusted to the constitutional jurisdiction bodies through the Constitutions of States and their active position in benefiting of these powers leads to a situation – as noted - where the law is no longer the exclusive product of Parliament and, under certain circumstances, of Government, but, at the same time, of Constitutional Courts, which have become "*actors of the complex law-making process"*[14] .

In the following, we shall present ways in which the Constitutional Court of Romania is associated to law-making activity. Without minimizing in any way its traditional role as "*negative legislator*" – as that is, in fact, the main route by which the authorities of constitutional jurisdiction are "cleaning up" the legal system (in the sense of the process of constitutionalisation of the law), we shall refer mainly to acts and situations that give expression to the creative role of these authorities, a role close to that of "*positive legislator*", joining thus and supporting some views of the specialised literature that state **«one cannot deny, so definitely and so trenchantly as it does sometimes happen, the constitutional court's role as a "positive and specific co-legislator"»[15].**

II. The creative role of the Constitutional Court

1. Identification of principles, rules and procedures that are not specifically enshrined in the Constitution.

The role of the constitutional jurisdiction bodies in the process of development of law is subordinated to the Constitution, as the interpretations and conclusions binding on States are sometimes "discovered" over the interpretation thereof as implicitly existing in the constitutional text. This approach is determined and justified by the fact that some constitutional principles are enshrined *expressis verbis* by Basic Laws, while others lack such enshrining, arising from other constitutional norms, from the entire set of constitutional rules, from the very meaning of the Constitution as the act that strengthens and protects the fundamental system of values of a nation, defining the guidelines of a State's legal system.

Once established in the case-law that such principles, rules or procedures have a constitutional rank, as arising from the letter and spirit of the Constitution, they can be directly invoked as grounds for constitutional review, just as a specific norm of the Constitution, or in necessary connection with such specific norm.

1.1 Constitutional principles

1.1.1 **The principle of constitutional loyalty/fidelity**

While not specifically qualified as a constitutional "principle", enshrining constitutional duty of loyalty has become increasingly common in the case-law of the Romanian Constitutional Court. This case-law has evolved from a simple statement of the concepts of "*loyalty*" and "*loyal behavio*ur" to circumstantiation of some "*rules of constitutional loyalty*" derived from a principle expressly enshrined in the Constitution - that of separation and balance of powers.

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[12]Ion Deleanu, *Judges Dialogue*, Romanian Journal of Case-Law, no.1/2012, 36

[13]the XIVth Congress of the Conference of European Constitutional Courts – "*Problems of legislative omission in constitutional jurisdiction*", Vilnius, 2009 – General Report published by the Constitutional Court of the Republic of Lithuania, 51

[14]Claudia. Gilia, *The rule of law theory*, 273, (Ch. Beck Publishing House, Bucharest 2007)

[15]Ion Deleanu, *Judges Dialogue*, Romanian Journal of Case-Law, no.1/2012, 36

Thus, for example, by Decision 356 of 5 April 2007[16] on the request for settlement of the legal dispute of a constitutional nature between the President of Romania and the Romanian Government, submitted by the Prime Minister, the Constitutional Court held that "*institutional relations between the Prime Minister and Government, on the one hand, and President of Romania, on the other hand, must function within constitutional framework of loyalty and cooperation, for the functions regulated separately for each of the constitutional authorities, as cooperation between authorities is a necessary and essential requirement for the effective operation of State's public authorities*".

Developing this line of cases by Decision 1431/2010[17] on the request for settlement of the legal dispute of a constitutional nature between the Romanian Parliament and the Government, submitted the President of the Senate, the Court held, on loyal behaviour, that it is "*an extension of the principle separation and balance of powers*".

Recently, by Decision 51/2012[18], delivered within the constitutional review of a law before promulgation[19], the Court emphasized, again, "*the importance for proper functioning of the rule of law, of cooperation between State powers, which must be in the spirit of constitutional loyalty norms*."

We consider that, by identifying the constitutional obligation of public authorities to have a loyal behaviour, this obligation became an implicit constitutional principle, and thus it can be relied upon as such within the referrals of unconstitutionality submitted to the Court.

Furthermore, a similar principle was enshrined in its case-law by the Federal Constitutional Court of Germany, in a more firm and clearly defined manner. This principle[20] - of faithful co-operation between organs (*Organtreue*)- was first mentioned in a set of constitutional complaint proceedings in which the complainants referred as reasoning for the unconstitutionality of a statute about which they were complaining to the recognised constitutional principle of federal comity (*Bundestreue*) (also referred to as the principle of conduct which is well-disposed towards the Federation (*bundesfreund-lichesVerhalten*)) which obliges the Federation and the Länder to give consideration to one another, and had claimed that, by analogy to this, the principle of faithful co-operation between organs applied in the relationship between the constitutional organs of the Federation. The Federal Constitutional Court initially left it open at that time as to whether such a constitutional principle exists and whether, if so, a complainant[21] in constitutional complaint proceedings can invoke it. The Court however explicitly recognised this principle in later rulings[22].

1.1.2 The principle of regulatory autonomy of the Chambers of Parliament

Pursuant to Article 61 of the Constitution of Romania, "*(1)Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country. (2)Parliament consists of the Chamber of Deputies and the Senate.*" and, pursuant to Article 64 paragraph (1) of the Constitution, "*Each Chamber is organized and functions as set forth in its*

[16]"Monitorul oficial al României" (Official Gazette of Romania), Part I, no.322 of 14 May 2007
[17]"Monitorul oficial al României" (Official Gazette of Romania), Part I, no.758 of 12 November 2010
[18]"Monitorul oficial al României" (Official Gazette of Romania), Part I, no.90 of 3 February 2012
[19] Law regarding the organisation of local government elections and elections for the Chamber of Deputies and Senate in 2012, as well as for the amendment of Title I of the Law 35/2008 on elections for the Chamber of Deputies and the Senate and the amendment of Law 67/2004 for the election of local authorities, Law 215/2001 on local public administration and Law 393/2004 on the status of local officials
[20]**www.ccr.ro** – excerpt of the*National Report for the XVth Congress of the Conference of European Constitutional Courts, presented by the Federal Constitutional Court of Germany,* Rapporteurs: Prof.Dr. Gertrude Lübbe-Wolff, Prof.dr. h.c. Rudolf Mellinghoff, Prof.Dr.ReinhardGaier, judges of the Federal Constitutional Court
[21] Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 29, 221 <233>
[22] see BVerfGE 89, 155 <191>; 97, 350 <374-375>; 119, 96 <122>

own Standing Orders. The Chambers' financial resources are provided for in the budgets approved by them".

Interpreting these provisions[23], the Constitutional Court stated that they enshrine "*the principle of parliamentary autonomy, embodied in a triple autonomy: statutory, institutional and financial*" holding that "*under the constitutional provisions mentioned, each Chamber has the right to establish, in limits and in compliance with constitutional provisions, rules of organisation and operation, which, in their substance, constitute the regulations of each Chamber. From this perspective, no public authority may decide, on the matters referred, for the Parliament, and also neither of the Chambers of Parliament may decide, on the same issues, for the other Chamber. As a result, the organisation and operation of each Chamber of Parliament are established by own regulations, adopted by own resolution of each Chamber by majority vote of the members of the respective Chamber.* "

Giving effect to this interpretation, the Court has developed rules regarding its referral for constitutional review of Parliament Regulations, it circumstantiated its jurisdiction over this review and clarified the procedure established by Law 47/1992 on the organisation and functioning of the Constitutional Court.[24]

In relation to its referral, the Court held that: "***even if not clearly specified in the constitutional provisions,*** *the legal grounds set forth herein, reconfirming the autonomy of the Chambers of Parliament, demonstrate the lack of active capacity of members of one of the Chambers of Parliament in the review of constitutionality of the provisions in the regulations of the other Chamber."* Consequently, the Constitutional Court of Romania did not proceed to the examination on the merits of the challenges of unconstitutionality, as the referral of unconstitutionality of the impugned provisions of the Senate's Standing Orders was formulated by a number of Deputies who, according to the provisions of Article 64 and Article 146 subparagraph c) of the Constitution, did not have the capacity to initiate such procedure. The Court adjudicated similarly by Decision nr. 68/1993[25], dismissing the referral of the liberal parliamentary group in the Senate concerning a resolution of the Chamber of Deputies, stating that "*on grounds of regulatory autonomy of each Chamber, the parliamentary group in the Senate cannot have the capacity as subject of the right to referral to the Court for such a case."*

Regarding jurisdiction, the Court held that it has no jurisdiction to review the constitutionality of the interpretation or application of Parliament Standing Orders[26]. By virtue of the principle of regulatory autonomy enshrined in Article 64 paragraph (1) first sentence of the Constitution, the Chambers of Parliament have exclusive jurisdiction to interpret the normative content of its own regulations and decide on how to apply them, and the failure to comply with regulatory provisions can can be ascertained and settled exclusively by means of parliamentary procedures and avenues [Constitutional Court Decisions 44/1993[27], 98/1995[28], 17/2000[29], 47/2000[30]]. Similarly, the Court, noting that in some cases, the challenges were aimed at the incomplete nature of some provision of the Standing Orders, or their incorrect wording,

[23]i.e., Decision 1009/2009, published in the Official Gazette of Romania, no.542 of 4 August 2009
[24]Monitorul Oficial al României" (Official Gazette of Romania), no.807 of 3 December 2010
[25]Monitorul Oficial al României" (Official Gazette of Romania), no. 12 of 19 January 1994
[26]for a similar distinction see The Constitutional Tribunal of Spain www.ccr.ro – The XVth Congress of European Constitutional Courts, General Report, Part I, T.Toader, M..Safta
[27]"Monitorul oficial al României" (Official Gazette of Romania), Part I, no.190 of 10 August 1993
[28]"Monitorul oficial al României" (Official Gazette of Romania), Part I, no.248 of 31 October 1995,
[29]"Monitorul oficial al României" (Official Gazette of Romania), Part I, no.40 of 31 January 2000
[30]"Monitorul oficial al României" (Official Gazette of Romania), Part I, no.153 of 13 April 2000

highlighting the need for supplementation or modification thereof, it found that such challenges were exceeding its jurisdiction.[31]

As for the rules of procedure, these concern teh request for the viewpoint provided under Article 27 paragraph (3) of Law 47/1992, stating that "*The Presidents of the two Chambers of Parliament may notify the viewpoints of the Standing Bureau, by the date of the debates*." Thus, although the legal text does not distinguish specifically, its interpretation by reference to constitutional provisions that led to the development of the principle of regulatory autonomy has determined that the request by the Constitutional Court of Romania of these viewpoints be done only by the Standing Bureau of the Chamber of Parliament whose standing orders are under debate.

1.1.3 The principle of bicameralism

The Constitution of Romania does not define the principle of bicameralism; but it establishes in Article 61 paragraph (2), that "*Parliament consists of the Chamber of Deputies and Senate*." On the grounds of this constitutional text, the Romanian Constitutional Court defined the principle of bicameralism, sanctioning, repeatedly, regulations adopted in violation of the interpretation of this principle established by the Court itself in its case-law.

Thus, the Court held that *"the parliamentary debate of a bill or of a legislative proposal cannot leave aside the assessment thereof in the plenary of the two Chambers of our bicameral Parliament. Therefore, the amendments and supplementations operated by the decisional Chamber on the bill passed by the first Chamber referred must relate to the matter had in view by the initiator and to the form passed by the first Chamber. Otherwise, only one Chamber, namely the decisional chambermight conduct the law-making process, which contravenes the bicameralism principle"*[32]. In addition to the afore stated, the Court also held[33] that " *as long as the Chamber of Deputies is the decisional Chamber, it can introduce in the text of the law new provisions pertaining to its decisional power and that are directly and inseparably connected with the original text of the bill or legislative proposal. Therefore, it is not imperative that both Chambers rule on a legal provision, it is sufficient in the case above stated that only one Chamber, the decisional one, decides".* By Decision 413/2010[34], the Court, summarizing those previously established, specified that the main criteria to determine the cases where legislative procedure violates the principle of bicameralism, respectively: "*major differences of legal content between the wordings adopted by the two Chambers of Parliament and the existence of a special configuration, significantly different between the wordings adopted by the two Chambers of Parliament* ".

Finally, by Decision 1018/2010[35], adjudicating on the observance of the same principle enshrined by means of case-law, the Court held that, "*regarding the function of regulation, legislative initiative belongs in equal measure to Deputies and Senators, which involves both the right of MPs to submit a legislative proposal to Parliament and their right to amend any legislative initiative submitted to Parliament. From the MPs right of legislative initiative stems each Chamber's right to decide on legislative initiatives before it. To debate a legislative initiative participate equally, both Chambers of Parliament, in compliance with the principle*

[31] Decision 317/2006, Official Gazette of Romania, Part I, no.446 of 23 May 2006

[32]Decision 472/2008, published in the "Monitoru Oficial al României" (Official Gazette of Romania), Part I, no.336 of 30 April 2008, Decision 710/2009, published in the "Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.358 of 28 May 2009

[33]Decision 1466/2009, published in the "Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.893 of 21 December 2009

[34]"Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.291 of 4 May 2010

[35]"Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.511 of 22 July 2010

concerning the power of referral provided by Article 75 of the Constitution, as the two Chambers are autonomous as concerns the adoption of legislative solutions in terms of initiatives under debate. From these principles of the bicameral system results that legislative initiatives may be amended or supplemented by the primary Chamber referred and that its decision is not limited by the content of legislative initiative in the form filed by the initiator, so as the decisional Chamber has the right to modify, complete or to abandon the initiative in question. [...] during debate of legislative initiatives, the Chambers have a personal right of decision, which was limited by the Constitutional Court, in its case law, to the only obligation that the same texts (the same content and same form of legislative initiative) be debated in both Chambers and not to the obligation of adoption of identical solutions."

The rules thus set out develop the constitutional norm of reference and require precisely that a creation of the legislator *–erga omnes*, inclusively in relation to the legislator that, upon adoption of any law, must comply with the criteria and rules thus established by the Court.

1.2. Constitutional rules and procedures

1.2.1 Appointment of Ministers

No law, and therefore, neither the Constitution can be exhaustive. Basic laws of States cannot explicitly regulate rules and procedures for all possible situations that may arise in practice.

From this perspective, whether we agree with the theory that the Constitution cannot have gaps (given its nature as basic law of the State and the idea of hierarchy of norms, any shortcomings of the Constitution are not interpreted as gaps of the supreme law, but deficiencies of drafting[36]) or with the theory that the Constitution, as any law, may have gaps (as long as it sets general and abstract rules), gaps that can be complemented by the interpretation of constitutional provisions[37], it is the task of Constitutional Courts to deduct the applicable constitutional rules when they must adjudicate on situations that do not have an explicit solution in the texts of the Basic laws.

Thus did the Constitutional Court of Romania, for instance by Decision 98/2008[38] for settlement of the legal dispute of a constitutional nature determined by the refusal of the President to act on the proposal submitted by the Prime Minister on an appointment to the office of Minister of Justice, while the constitutional text of reference - namely Article 85 - provides no procedure to follow in the event of such refusal. The Court sought the meaning of the norm of Article 85 paragraph (2) of the Constitution "*in the letter of this text, as well as in the basic principles and spirit of the Basic Law*" and, following this interpretation approach, it established the procedure to be followed: "*while applying Article 85 paragraph (2) of the Constitution, the President of Romania, not having right of veto, may ask the Prime Minister only once, upon statement of grounds, to nominate a different person for the office of minister". The Court also stated that "the reasons for such request made by the President of Romania cannot be censored by the Prime Minister,* [and] *as concerns the Prime Minister's possibility to reiterate his first proposal, the Court finds that such possibility is excluded by fact that the President of Romania*

[36]see the reports of the Constitutional Courts of Hungary, Armenia, Czech Republic, Albania, at the XIVth Congress of the Conference of European Constitutional Courts - "*Problems of legislative omission in constitutional jurisdiction*", Vilnius, 2009 - General Report published by the Constitutional Court of the Republic of Lithuania

[37] see the reports of the Constitutional Courts of Austria, Azerbaijan, Estonia, Portugal, Turkey, at the XIVth Congress of the Conference of European Constitutional Courts - "*Problems of legislative omission in constitutional jurisdiction*", Vilnius, 2009 - General Report published by the Constitutional Court of the Republic Lithuania

[38]Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.140 of 22 February 2008

declined the proposal from the beginning. Therefore, the Prime Minister must nominate a different person for the office of minister".[39]

1.2.2 Exercise of the constitutional right of the Chamber of Deputies, the Senate and the President of Romania to request prosecution of members of the Government

Proceeding similarly, by Decision 270/2008[40], delivered following the settlement of a legal dispute of a constitutional nature, the Constitutional Court grasped, from the interpretation of Article 109 paragraph (2) of the Constitution, reading as follows "*Solely the Chamber of Deputies, the Senate, and the President of Romania have the right to demand criminal prosecution be taken against Members of the Government for acts committed in the exercise of their office. Where criminal proceedings have been requested, the President of Romania may decree suspension from office. Indictment of a Member of the Government will result in his suspension from office. Jurisdiction for trial belongs to the High Court of Cassation and Justice",* the procedure to be followed and the jurisdiction of each of the authorities involved. The Court stated that *„in the meaning of this constitutional provision, the submission of referral to one of the three authorities to require prosecution cannot be preferentially or randomly made by the Public Ministry – the Prosecution Office attached to the High Court of Cassation and Justice,* [because] *cumulating the capacity as Deputy or Senator with that of Member of Government naturally draws after itself, according to Article 109 paragraph (2), the competence of the Chamber of Deputies or the Senate to require prosecution, as the case may be".* Consequently, *"the Prosecution Office attached to the High Court of Cassation and Justice must address one of the three authorities, as follows: a) the Chamber of Deputies or the Senate – for members of Government or former members of Government (Prime Minister, Minister of State, Minister, Minister Delegate, as the case may be) who at the time of referral, are also Deputies or Senators; b) the President of Romania – for members of Government or former members of Government (Prime Minister, Minister of State, Minister, Minister Delegate) who at the time of referral, are not also Deputies or Senators".* The Court concluded that the text of Article 109 paragraph (2) of the Constitution enshrines *„ the absolute right of each of the three public authorities to demand prosecution, and the exercise thereof by one of them cannot be detrimental to the other, the right of one not being subject to the right of the others".*

1.2.3 Reexamination of the law by Parliament in order to being into accord the provisions declared unconstitutional within the *a priori* review with the decision of the Constitutional Court ascertaining the unconstitutionality thereof

Another example of "prescription" of the rules to be followed by the authorities involved in a constitutional procedure is Decision 975/2010[41], whereby the Constitutional Court ruled on the scope and content of the procedure of re-examination of the law provided by Article 147 paragraph (2) of the Constitution and Article 18 paragraph (3) of Law 47/1992 on the organisation and functioning of the Constitutional Court, according to which "*in cases related to*

[39]to decide so, the Court notes that *„As concerns the number of cases in which the President of Romania may ask the Prime Minister to make a different nomination for the vacant office of minister, the Court finds that, in order to avoid the occurrence of an institutional blockage in the lawmaking process, the constituent legislator provided under Article 77 paragraph (2) of the Basic Law, the President's right to return a law to Parliament for reconsideration, only once.The Court finds that this solution acts as a constitutional principle in the settlement of legal disputes between two or several public authorities which have conjoint duties in the adoption of a measure provided by the Basic Law and that this principle can be generally applied in similar cases. Applied to the process of government reshuffle and appointment of some minister in case of vacancy of the offices, this solution could eliminate the blockage generated by the possible repeated refusal of the President to appoint a minister at the proposal of the Prime Minister".*

[40]published in the Monitorul Oficial al României (Official Gazette of Romania),, Part I, no.290 of 15 April 2008

[41]Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.568 of 11 August 2010

laws declared unconstitutional before their promulgation, Parliament must reconsider those provisions concerned in order to bring such into line with the decision rendered by the Constitutional Court".

The Court held that *«the decision whereby the objection of unconstitutionality was partially upheld led to the initiation as of right of the complementary procedure of re-examination of the law by Parliament in order to bring into line the unconstitutional provisions with the decision of the Constitutional Court, according to Article 147 paragraph (2) of the Basic Law. In this procedure, Parliament can amend also other legal provisions only if they are in inseparable connection with the provisions declared as unconstitutional, to ensure consistency of regulation and, as far as necessary, it will re-correlate other provisions of the law in question [...] within the review procedure governed by Article 147 paragraph (2) of the Constitution, Parliament has no constitutional power to change the legal provisions found to be constitutional, but it can only bring into line the unconstitutional provisions with the decisions of the Constitutional Court; certainly, as noted above, Parliament can amend also other legal provisions only if they are in inseparable connection with the provisions declared as unconstitutional. Therefore, "other improvements" that would cover only the impugned law can be operated only by other laws or ordinances for modification and supplementation.»*

1.2.4 Requirements for Government's assumption of responsibility on a bill

The provisions of Article 114 of the Constitution, which govern this procedure, provide as follows: the Government can assume its responsibility „*before the Chamber of Deputies and the Senate, in a joint session"*; The Government shall be dismissed if a motion of censure, tabled within three days after presentation of the bill, is passed in accordance with Article 113, i.e. by a majority vote of Deputies and Senators; unless the Government is dismissed, the bill presented, be it modified or supplemented with the amendments consented by the Government, is deemed to have been passed. The Constitution does not establish therefore in Article 114, any conditions on the nature of the bill, its structure, the number of bills on which the Government may assume responsibility in the same day or another period of time, or on when the Government decides to assume responsibility. Therefore, the role went to the Constitutional Court, as the guarantor of the supremacy of the Constitution, to grasp from the interpretation of norms in the Basic Law, the rules applicable in this situation.

Without further examining the entire evolution of the case-law of the Constitutional Court in this matter[42], we only mention Decision 1655/2010, where, ascertaining the unconstitutionality of the Law on the 2011 remuneration of personnel paid out of public funds, in its whole, as well as, especially, in relation to Article 1 of the law, the Court summarised its previous considerations concerning the respective procedure, ruling that assumption of responsibility by Government on this bill complies with the requirements of Article 114 of the Constitution, namely:

"– existence of an emergency in the adoption of measures contained in the law on which the Government assumed responsibility;

- the need for legislation in question to be adopted with utmost celerity;

- the importance of the area covered;

- the immediate application of the relevant law."

[42]M.Safta, *Government's assumption of responsibility on a bill. Relevant case-law of the Constitutional Court*, in the Constitutional Court Bulletin no.2/2010, www.ccr.ro

The Court explained[43] its approach to identifying these rules, holding that the "*legitimacy of such an act* (a.n. the Government's assumption of responsibility in breach of the mentioned requirements) *with the argument that Article 114 of the Constitution makes no distinction on the Government's opportunity to assume responsibility, an argument based on the idea that everything not forbidden is allowed, could lead eventually to the creation of institutional stalemate, meaning that Parliament would be unable to legislate, i.e. to exercise the its primary role, as sole legislative authority*. "

In a recent decision[44], the Court added that beyond these formal criteria, in exercising the option for the procedure for adopting a bill, account must be given to the fact that some areas of regulation, by their specificity (e.g. elections), recommend that the regulations in matters to be debated in Parliament, "*and not adopted by means of proceedings with exceptional character, where the Parliament is avoided, but forced to a tacit vote on a normative content almost exclusively at the discretion of Government. The mechanism of motion of censure, governed by Article 114 of the Constitution, may be illusory when the Government has a safe majority in Parliament, and the adoption of bill on which the Government assumes responsibility becomes, in these conditions, a pure formality*. "

2. Defining and explaining the concepts of the Basic Law

Unlike the situation in which, by means of interpreting the Constitution, the Court identifies default constitutional rules, which become themselves the basis for exercising constitutional review, in this case the Court only defines some expressions enshrined by the constituent legislator. This intervention is necessary because, as noted, "*the Constitution inevitably uses some concepts or principles which, by their content, are in reality* ***a true legislative delegation*** *in favour of the interpreter. These are concepts that allow expansion of the constitutional provisions whose content indefinite by the constituent legislator, varies depending on the social developments*"[45]. The meaning of these concepts or principles established by the Constitutional Court "*is received at the social level and determines constitutional state of society*"[46], and eliminates possible differences in interpretation between the other recipients of the constitutional norms, thus realizing the constitutional basis for the legislative activity, respectively enforcement of the law.

Thus, for example, in exercising a new power introduced following the revision of the Constitution, namely to resolve legal disputes of a constitutional nature between public authorities, and provided that no constitutional text specifies what is meant by "legal *dispute of a constitutional nature*", the Constitutional Court of Romania had to do to define this phrase itself, ruling that a legal dispute of a constitutional nature between public authorities requires "*specific acts or actions whereby an authority or more assume powers, duties or competences, which, according to the Constitution, belong to other public authorities, or omission of certain public authorities, involving disclaimer of jurisdiction or failure to perform certain acts that fall within their obligations* " (Decision 53/2005[47]). The Court also held that the text of Article 146 subparagraph e) of the Constitution "*establishes the competence of the Court to resolve basically*

[43]Decisionno. 1431/2010, „Monitorul oficial al României, Partea I" (Official Gazette of Romania, Part I), no.758 of 12 November 2010
[44]Decisionno. 51/2012
[45] I. Vida – *cited work*, p.202
[46]*Ibidem*, p.202
[47]„Monitorul oficial al României" (Official Gazette of Romania), Part I, no.144 of 17 February 2005

any legal dispute of a constitutional nature arisen between the public authorities and not only the disputes of jurisdiction arising between them" (Decision nr.270 / 2008[48]).

Similarity, to deliver the Advisory opinion 1/2007 on the proposal to suspend the President of Romania from office, the Court proceeded to the interpretation and application of Article 95 paragraph (1) of the Constitution which provides that the President of Romania may be suspended from office if he committed a serious offence in violation of the Constitution, a text that does not define the notion of serious offence. Therefore, to decide if the conditions for suspension from office of President of the Romania are complied with, the Constitutional Court firstly established the meaning of this notion, holding in this respect the following: «*it is obvious that an act, that is an action or inaction, which violates the provisions of the Constitution, is serious in relation to the object of violation. But in regulating the procedure of suspension from office of the President of Romania, the Constitution is not limited to this meaning because, if it were so, the term "serious offence" would not make any sense. Analyzing the distinction contained in the quoted text and considering that the Basic Law is a normative legal act, the Constitutional Court finds that not every act of violation of the Constitution can justify suspension from office of the President of Romania, but only "serious offence", according to the complex meaning of this notion that in the science and practice of law. From the legal viewpoint, the seriousness of an offence is assessed against the value that it affects, as well as its harmful consequences, potential or produced, the means employed, the individual offender and, last but not least, with the latter's subjective position, the purpose for which he/she committed the offence. Applying these criteria to the acts of violation of constitutional legal order referred to in Article 95 paragraph (1) of the Basic Law, the Court notes that can be considered serious offences in violation of the Constitution the acts of decision or the failure to meet mandatory acts of decision by the President of Romania that would prevent the operation of public authorities, would suppress or restrict citizens' rights and freedoms, would disturb the constitutional order or would pursue change of the constitutional order or other acts of similar nature which would or could have similar effects*. "

By virtue of the *erga omnes* binding effect of the decisions of the Constitutional Court, whenever the Court is notified on the relevance of a constitutional notion which has been conceptually defined or clarified by the Court, the Court's analysis will be carried out in the framework it established itself. As concerns the example extracted from an advisory opinion of the Court, we consider that, although the solution delivered by the Court is merely advisory (as this is the legal nature of the opinion), the Court's interpretation to the constitutional text of reference (Article 95) is mandatory.

3. "Correction" of legislative omissions

This occurs in those situations where the primary or delegated legislator fails to comply with its positive obligation of enacting rules achieving the constitutional requirements. It is a different situation from that concerning the legislator's negative obligation – to refrain from enacting rules contrary to constitutional prescriptions.

We should mention from the start that neither the Constitution nor the organic law of the Constitutional Court of Romania enshrine *expressis verbis* a power of the Constitutional Court to correct the legislative omissions or gaps. In fact, this occurs in most States that enshrine the same

[48] „Monitorul oficial al României" (Official Gazette of Romania), Part I, no.290 of 15 April 2008

model of constitutional review[49], except for Portugal, whose Constitution provides, under Article 283.1, the power of the Constitutional Court to review legislative omissions. Nonetheless, some Constitutional Courts established, in their case-law, by means of interpretation of the principles specifically or implicitly provided in the Constitutions, their power to correct such omissions**.**

As concerns the Constitutional Court of Romania, its case-law includes, in relation to the legislative omissions problem, two classes of decisions: the first category, the most representative in terms of number; is that of decisions in which are rejected as inadmissible the exceptions of unconstitutionality of alleged legislative omission; the second category is that of decisions where legislative omission was the argument for finding unconstitutional certain legal provisions. We will refer only to the latter category, which is particularly interesting from the perspective of this study, and which reflect the existing trends in the case-law of other European Constitutional Courts (Italy, Poland, Spain, Czech Republic, Germany, Hungary), respectively that to eliminate legislative omissions, essentially considered as having significance of inadequate execution of the obligation of the legislature to establish rules imposed by the Constitution.

Thus, we mention Decision 349/2001[50], where the Court found that the provisions of Article 54 paragraph 2 of the Family Code *are unconstitutional to the extent in which* they only acknowledge the father's, and not also the mother's and the child's born in wedlock right to commence an action to disclaim paternity. The Court held that *„the enshrining, through the provisions of Article 54 paragraph 2 under the Family Code, of the right to contest the presumed paternity only in favour of the presumed father, excluding the mother and the child born in wedlock, equally entitled to the legitimate interest to promote such action, represents an infringement of the principle of equal rights provided by Article 16 paragraph (1) of the Constitution. Likewise, the provisions under Article 54 of the Family Code, to the extent in which they refuse the acknowledgement for the mother of the right to disclaim the presumed paternity, contravene also the provisions under Article 44 paragraph (1) of the Constitution which enshrines the equality between spouses as one of the principles on which the family institution is based on. The Court also holds that the text impugned contravenes also paragraph 2 of Article 26 of the Constitution, to the extent in which it does not acknowledge also the child's right to contest the presumed paternity, circumstance meant to impose him/her a certain legal status established through somebody else's will, which he/she must accept passively, without being able to take action for the modification thereof, which can only represent a denial of the right acknowledged for each and every natural person, through the constitutional article abovementioned, to freely dispose of himself/herself. The Court considers that the acknowledgement, in favour of the child, of the right to contest the presumed paternity, as an expression of the constitutional right of each and every person to freely dispose of himself/herself, does not encroach upon the rights and freedoms of others, on public order, or morals, and, therefore, it finds no justification for the infringement of the constitutional provision. Therefore, the non acknowledgement, as concerns the child, of the right to establish his/her own affiliation towards father, in concordance with the reality, against a fiction, right acknowledged though to the presumed father, represents an obvious breach of the constitutional text."*

A special case is that where the Constitutional Court sanctioned repealing or modifying rules whereby the legislator deprived of legal protection certain rights and constitutional values. Thus, for example, by Decision 62/2007[51] it declared unconstitutional Law 278/2006 which

[49]see the XIVth Congress of the Conference of Europen Constitutional Courts – "*Problems of legislative omission in constitutional jurisdiction*", Vilnius, 2009 - General Report published by the Constitutional Court of the Republic Lithuania

[50] published in the Official Gazette of Romania, Part I, no.240 of 10 April 2002

[51]"Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.104 of 12 February 2007

repealed from the Criminal Code the offences of insult and libel and as reasons for the decision, inter alia, the following were held: *„The legal object of the offences of insult and calumny, provided by Article 205 and, respectively, Article 206 of the Criminal Code, is the dignity of the person, his/her reputation and honour. The active subject of the analysed offences is not circumstantiated, and the commitment thereof can be performed directly, through speech, through texts published in the written press or through means of audiovisual communication. Regardless of the manner in which such offences are committed and of the quality of the persons committing such offences –mere citizens, political figures, journalists and so on –, the actions that constitute these offences severely infringe human personality, dignity, honour and reputation of those attacked in this way. If such actions were not discouraged by means of the criminal law, they would lead to the de facto reaction of those offended and to permanent disputes, which would render impossible the social cohabitation, which implies respect towards each member of the community and equal appreciation of each one's reputation. That is why, the mentioned values, protected by the Criminal Code, have a constitutional statute, human dignity being enshrined through Article 1 paragraph (3) of the Constitution of Romania as one of the supreme values. […] Taking into account the outstanding importance of the values enshrined by the provisions of Articles 205, 206 and 207 of the Criminal Code, the Constitutional Court finds that the repealing of these legal texts and the decriminalization, in this way, of the crimes of insult and calumny contravene the provisions of Article 1 paragraph (3) of the Constitution of Romania. In the same respect, the Court holds that, by the repeal of the mentioned legal provisions was created an inadmissible* ***legislative lacuna****, contrary to the constitutional provision that* ***guarantees human dignity as a supreme value****. In absence of the legal protection provided by Articles 205, 206 and 207 of the Criminal Code, human dignity, honour and reputation do not benefit of any other form* ***of real and adequate legal protection****."*

Similarly, by Decision 694/2010, the Court found unconstitutional the provisions of Law 356/2006 Article I point 184 amending and supplementing the Criminal Procedure Code and amending other laws concerning the amendment of the provisions of Article 385, paragraph 1 point 12 of the Criminal Procedure Code and, in the reasons set forth in this decision, it held that "*eliminating the possibility of challenging a judgment by means of appeal when the constitutive elements of a crime are not fulfilled, precludes the interested party from effectively recover the right violated, so the provisions of Article I point 184 of Law 356/2006 in the part referring to the amendment of the provisions of Article 385 paragraph 1 point 12 of the Criminal Procedure Code contravene the constitutional provisions of Article 21 and of Article 20 in relation to Article 13 of the Convention for the protection of human rights and fundamental freedoms*." The Court also found that the reasons for its decision" *does not amount to an unlimited setting of other remedies, even if an alleged illegal sentence was pronounced on appeal, because the Romanian criminal procedural law, which includes three levels of jurisdiction, is considered as sufficient to give assurance and effectiveness in terms of allegedly violated rights*."

Concerning the effects of the decision rendered by the Constitutional Court ascertaining the unconstitutionality of a repealing act, we share the opinion expressed in the doctrine in the meaning of cessation of applicability of the respective act, and the consequent re-entry into force of the repealed normative act[52]. If that act remained repealed and given the legislator's passive attitude after delivery of the Court's decision ascertaining the unconstitutionality of the repealing act, the constitutional review would be deprived of efficiency and the provisions relating to the role of the Constitutional Court would be infringed.

[52]I. Vida, cited work, 94

4. "Confirmation" of a certain interpretation of legal norms (interpretative decisions)

We believe that this type of decisions expresses both the role of Constitutional Courts as *negative legislator* and that as *positive legislator*. This is because, eliminating a certain interpretation of the legal norm as being unconstitutional (which gives expression to its traditional role), the Court retains at same time a certain meaning, being thus associated to the legislator in giving a certain meaning to the statutory provision in accordance to the letter and spirit of the Constitution (which expresses the role of positive co-legislator). The Court thus does not create a new rule, but provides to a pre-existing rule an unequivocal meaning, one that is consistent with the Basic Law.

Another recent example is Decision 766/2011[53] where, adjudicating, *inter alia*, on the constitutionality of the provisions of Article 29paragraph (1) of Law no.47/1992, reading as follows "*the Constitutional Court shall decide upon the exceptions raised before the courts of law or of commercial arbitration referring to the unconstitutionality of laws and ordinances which are in force, or any provision thereof, where such is in connection with the judgment of the case at any stage of trial proceedings and regardless of its object",* the Constitutional Court held that «the expression *"in force" within the provisions of Article 29 paragraph (1) and of Article 31 paragraph (1) of Law 47/1992 on the organisation and functioning of the Constitutional Court, republished, is constitutional insofar as it is interpreted in the sense that are subject to the constitutional review also laws or ordinances or provisions of laws or ordinances which continues to produce legal effects also after there are no longer in force*». By this decision, the Court gave a certain meaning to the will of the legislator, basically emphasizing the moment of application in time of legal norms envisaged by it (or that it had to consider so that norm be consistent with the Basic Law) upon establish the condition that the norm that is subject to constitutional review by way of exception of unconstitutionality to be "*in force*".

5. Recommendations to the legislator

We consider relevant in this respect, as concerns the Constitutional Court of Romania, the decisions rendered in exercising its power to rule, ex officio, on initiatives for revision of the Constitution.

Thus, for example, by Decision 799/2011 on the bill concerning the revision of the Constitution, initiated by the President of Romania, at the Government's proposal, ruling on the proposal for amending Article 61 of the Basic Law - Role and structure of [Parliament], the Court held that, "*having examined the contents of the revision bill and the explanatory memorandum thereof, one can note that the largest proposed change concerns the shift to a unicameral Parliament and setting a maximum number of 300 MPs, with the proper re-correlation of the constitutional text referring to the Parliament, Senators and legislative procedure*." Noting that "*the proposed amendment in this regard is consistent with the national referendum of 22 November 2009, initiated by the President of Romania and confirmed by the Constitutional Court [...]*", and that the amendment "*does not affect any of the limits in matter of revision provided by Article 152 of the Constitution, but is only a political choice on which the participants to the procedure for revision of the Constitution will decide*", the Court, further, made a series of observations and recommendations for the derived constituent legislator.

[53]"Monitorul Oficial al României" (Official Gazette of Romania),, Part I, no.549 of 3 August 2011

Thus, the Court held that "*however, in expressing this option, the tradition of the Romanian State and the advantages offered by a bicameral structure of Parliament in relation to a unicameral structure should not be ignored. […] Traditionally, the Romanian Parliament had a bicameral structure. This structure of the legislative forum, enshrined in 1864, through the "Developing Statute of the Paris Convention" of the Romanian Ruler Alexandru Ioan Cuza, continued to exist under the rule of the 1866 1923 and 1938 Constitutions, being interrupted only during the communist regime, when national representation was unicameral – Grand National Assembly. After the revolution of 1989, by Decree-Law no. 92/1990 for the election of the Parliament and the President of Romania, published in the Official Gazette, Part I, no. 35 of 18 March 1990, the act under which elections were held in May 1990, was reintroduced the bicameralism formula. The 1991 Constitution restated, with some modifications, this structure of Parliament, upheld on the occasion of the 2003 revision of the Basic Law. Modification of relevant text, made on the occasion of the revision, aimed only the change to a system of functional bicameralism. The advantages of a bicameral structure of the legislative forum are quite obvious. Thus, it is avoided the concentration of power in Parliament, because its Chambers will prevent each other from becoming a support for an authoritarian regime. At the same time, it provides debates and a framework for successive analysis of laws by two different bodies of the legislative forum, which provides greater guarantee of the quality of the legislative act. Adoption of laws in a unicameral parliament is made after several successive "readings" of a text, as, it is, in fact, proposed in this draft law for revision of the Constitution. Being carried out by the same legislative body, readings can become an artificial formality, or can be removed for emergency reasons. Bicameralism determines that the second reading of the law be always carried out by another assembly, which is likely to cause a sharp critical perception. It is thus provided the opportunity for better critical cooperation, common and collective decision-making debate, being emphasized the formation of the will of the parliamentary state. In addition, the bicameralism minimizes the risk of majority rule, promoting dialogue between majorities of both Chambers, as well as between parliamentary groups. Cooperation and legislative supervision are extended in this way, thus demonstrating that the bicameral system is an important form of separation of powers, which does not function only between the legislative, the executive and the judiciary, but also within the legislative power. Both tradition which, being connected to the being of the Romanian State, defines and represents the same, as well as the mentioned advantages are strong grounds for reflection on the occasion of option for one of two formulas: unicameralism or bicameralism."*

III. Generally binding character of decisions of the Constitutional Court, "as a whole", and regardless of outcome

The role of the Romanian Constitutional Court case-law as source of law was emphasized even by this Court, which held - even if initially only on its traditional role - that "*the decision finding the law unconstitutional is part of the normative order and by its effect the unconstitutional provision ceases its future application*."[54] Developing this idea upon examination of the regulation that established the misconduct of judges and prosecutors consisting in failure to comply with the Constitutional Court's decision, the Court held that the legislation «gives expression to the provisions of Article 1 paragraph (5) of the Constitution, establishing that "*Observance of the Constitution, of its supremacy, and the laws shall be*

[54]Decision847 of 8 July 2008, published in the Official Gazette of Romania, Part I, no.605 of14 August 2008

obligatory in Romania", in conjunction with Article 142 paragraph (1), establishing that "*The Constitutional Court shall be the guarantor for the supremacy of the Constitution*"».[55].

The issues raised in that case, settled by Decision 2/2012 on the objection of unconstitutionality of the Law *amending Law 303/2004 on the status of judges and prosecutors and the Law 317/2004 on the Superior Council of Magistracy*, strengthen the conclusions of this study, in the sense of development of the Constitutional Court and of its role. These relate mainly to the distinction which is said to exist in terms of the *ergaomnes* obligation, between the decisions of admission rendered by the Constitutional Court, respectively of that of rejection of referrals of unconstitutionality, and the distinction between the binding character of the operative part of the decision and the considerations on which it rests.

By Decision 2/2012, answering to the criticism whereby, distinguishing between decisions ascertaining the unconstitutionality, respectively the constitutionality of a piece of legislation, it was argued that the latter are not of binding nature, the Court held that the text of Article 147 paragraph (4) of the Constitution, which enshrines the general binding nature of its decisions, "*does not distinguish between the types of decisions rendered by the Constitutional Court, nor on the content of these decisions, which leads to the conclusion that all decisions this Court, as a whole, are generally binding*. "

We believe that the wording used by the Court, i.e. "*as a whole*" does not refer to the decision in its entirety, but to its *ratio decidendi*, that is the reasons directly influencing the decision- whether its solution is to accept or reject the referral of unconstitutionality - thus the essence of legal reasoning that substantiates it. As in case of precedent in common law[56], "*ratio decidendi* must be distinguished from *obiter dicta*, that is what the judge declares without such being absolutely necessary." It seems indisputable that the court refers to the solution and the motivation that substantiates it, as a unit of legal reasoning. Another interpretation cannot be accepted given the diversity of decisions rendered by the Constitutional Court because their application according to the letter and spirit of the Constitution could not be obtained unless providing efficiency to considerations supporting the decision delivered by the Court. But the legal rigor requires a necessary distinction within these considerations.

Concerning the importance and binding nature of the reasoning part of the decisions of the Constitutional Court, during the study referred above[57] we noted the already frequent practice of the Constitutional Court of Romania to mention, within the decision it delivers, the fact that the *res judecata* characterising jurisdictional acts, therefore also decisions of the Constitutional Court*, „applies not only to the operative part, but also to the reasoning substantiating the same",* as well as the obligation of both Parliament and the Government and public institutions to comply *„fully both with the reasoning part and with the operative part"* of the respective decisions. This practice proves the Court's intention to render effective its decisions, both subjects entrusted with the law-making act, and those entrusted with the application of the law. In that context we substantiality asserted that „*compliance with the generally binding effect of decisions of the Constitutional Court does not only involve rendering efficient the operative part thereof but equally the reasoning part[58], respectively the Constitutional Court's interpretation in relation to*

[55]Decision 2/2012, published in the Official Gazette of Romania, Part I, no.131 of 23 February 2012

[56]widely in this respect, Dan Claudiu Dănişor, Ion Dogaru, Gheorghe Dănişor, cited work, p.145

[57]M.Safta, K Benke, *Binding nature of the Constitutional Court Decisions Reasoning*, the "Law" Magazine 9/2010

[58] „decision is a whole, a unit of reasoning and operative parts, and the Court will therefore reflect the decision's operative part in terms of its reasoning; furthermore, if there is a contradiction between the two components of the decision, it might become inapplicable as the authority who should enforce it would have to choose at his discretion between the two elements of the decision, which is inadmissible, therefore a contradiction in the body of the decision would call into question even its res judicata; for a critical study under this aspect see also Ş. Belingrădeanu, I. T. Ştefănescu, *Considerations on certain provisions relating to salaries of employees paid from public funds, cumulated earnings from pension and salary, overlapping of functions and*

the texts of the Constitution, inclusively when these texts are those regulating the effects of decisions of the Court", as well as that *„failure to comply with the ruling of the Court may constitute grounds for an action in court by such persons whose rights are thus violated*."

The recent amendment of Law 303/2004 on the status of judges and prosecutors, by Law 24/2012[59], established as misconduct, "*failure to comply with decisions rendered by the Constitutional Court or decisions rendered by the High Court of Cassation and Justice in the resolution of appeals in interest of law.*"[Article 99 subparagraph ș) of Law 303/2004, as amended], so it devoted a specific rule that can constitute grounds for the purposes of the above mentioned.

IV. Final considerations

Constitutional Court's role in the rule of law, in terms of the analyzed evolution, raises mainly three problems: whether the Court's association, as shown, in the legislative process, is compatible with the principle of separation and balance of powers enshrined in Article 1 paragraph (4) of the Constitution; the effectiveness of constitutional justice, which is reflected in how Constitutional Court's acts are respected and enforced; the responsibility of the Constitutional Court.

Regarding the first problem, we consider that the answer can only be positive: yes, the role of the Constitutional Court is compatible with the principle of separation of powers. We disagree in this respect with the opinion of some experts claiming that the Constitutional Courts are a third Chamber of Parliament[60]. This because the activity of the Court is justified by its specific power. In exercising this power, the Constitutional Court has proceeded and shall proceed to the explanation, interpretation (systematic, grammatical, teleological) or reasoned support of rules created by the constitutional or derived, primary or delegated legislator, namely to boost the latter in creating rules to cover situations not covered, but which should be regulated. In other words, the Court supports the development of law, with different instruments and in carrying out different tasks from those of the legislator. Hence, both formulations - "*negative legislator*" and "*positive legislator*" seem objectionable, and that is why we prefer the formulation *co-legislator* that takes into account both hypotheses, and that foes not suggest an institutional substitution.

As concern the second problem mentioned above, it has been said that "*the effectiveness of decisions has been and is closely related to the loyal behaviour of constitutional authorities*." Since it involves a large degree of discretion and a component of relativity, we consider that the legislator's intervention is necessary in the meaning of expressly establish some enforcement mechanisms, respectively sanctions applicable in case of failure to comply with the Constitutional Court's decision[61].

Performing in this respect a brief examination of comparative law, we not that in some European countries, even constitutional courts may play a role in appointing the competent body to enforce its decisions and / or to determine how it will be enforced[62].

Thus, in Austria, execution of decisions rendered by the Constitutional Court is implemented by the ordinary courts or by the Federal President, according to the distinctions

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collective bargaining enshrined in Laws 329/2009 and 330/2009, as well as in Government Emergency Ordinance 1/2010, in the "Law" Magazine 4/2010, p.11-44 "

[59] Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.51 of 23 February 2012

[60] in the same vein, Claudia Gilia, op. cit., p.273

[61] we consider that Law 24/2012 is such a legislative intervention

[62] for examples see www.ccr.ro – the XVth Congress of European Constitutional Courts, General Report, Part I – The Cosntitutional Court's relationship to Parliament and Government, authors Tudorel Toader, Marieta Safta

made in the Federal Constitution. Where the Federal President is the one authorized to enforce such decisions, then the request to the President has to be made by the Constitutional Court. Furthermore, the execution shall, in accordance with the President's instructions, lie with the Federal or the Länder authorities, including the Federal Army, appointed at his discretion for the purpose.

In *Croatia*, the Government ensures the execution of the Court decisions and rulings through the bodies of the central administration; however, the Court itself may determine which body shall be tasked for the execution of its decision or its ruling, as well as the manner in which the decision or ruling must be executed. Consequently, the Court in fact orders the competent bodies to implement general and/ or individual measures which derive of its decisions. At the same time, the Court is authorized to indicate the procedure, the deadlines and the specific means for the enforcement of its decisions (Russia), but it may also place an obligation on the competent state bodies to ensure execution of its decision or adherence to its opinion (Ukraine).

In *Germany*, usually, the Court itself may ensure the execution of its decisions by means of independent transitional arrangements or orders on the further application of laws which have been rejected. The Federal Constitutional Court was given jurisdiction for also executing its decisions; consequently, the Court itself may state in the respective decision by whom it is to be executed, it may further on regulate the "method of execution" in individual cases and issue all orders required to effectively "enforce" its decisions. The Federal Constitutional Court is also entitled to task individuals, authorities or organs which are subject to German state power to carry out concrete execution measures. Therefore, the Federal Constitutional Court knows two forms of tasking to execute decisions: the Court may either task an agency in general terms to execute decisions and leave it to implement the execution measures at its own discretion, or the Court may entrust an agency with a concrete execution measure which is precisely determined, and hence make the tasked party "the executing organ" of the Federal Constitutional Court. Inasmuch as it may be necessary, it can also commission other agencies to implement temporary injunctions.

In *Serbia*, the Constitution has vested the Constitutional Court with the power to issue a special ruling regulating the manner in which its decision will be enforced and which is also binding. Enforcement is either made directly or via a competent state administration authority in the manner laid down in the Constitutional Court ruling. The Court may determine which authority should implement the decision and the manner of implementation, if necessary. This practically entails an authorisation for the Constitutional Court to fill the legal gap arising from its finding of unconstitutionality. In terms of their legal nature, such a decision differs from those rendered within the constitutional review.

In the case of the *amparo* constitutional review, the organic Law of the Constitutional Tribunal provides that it may order "*who shall bear the responsibility to enforce judgment and, as the case may be, resolve the incidents arising in the course of enforcement*". Executory provisions may also be included in the decision passed or in any other subsequent acts. The Tribunal may also declare null any decision that would go against the one being handed down in the exercise of its powers.

As concerns the Constitutional Court of Romania, when it found, upon settlement of referrals of unconstitutionality, situations of non-compliance with its decisions, it sanctioned them by declaring unconstitutional the normative acts adopted in this way. Thus, for example, by Decision 1018/2010[63] , the Court declared the unconstitutionality of the provisions under the Law on integrity in exercising public functions and offices, amending and supplementing Law no.

[63]Monitorul Oficial al României" (Official Gazette of Romania), Part I, no.511 of 22 July 2010

144/2007 on the establishment, organisation and functioning of the National Integrity Agency, as well as amending and supplementing other laws, an normative act perpetrating provisions that had been declared unconstitutional. On that occasion, the Court held that *"adoption by the legislature of norms contrary to what the Constitutional Court established by its decision, whereby it tends to maintain the legislative solution tainted by unconstitutionality flaws, is contrary to the Basic Law. However, in a State of law, such as Romania has been proclaimed in Article 1 paragraph (3) of the Constitution, public authorities do not enjoy any autonomy in relationship to law, as the Constitution establishes in Article 16 paragraph (2) that nobody is above the law, and in Article 1 paragraph (5) that compliance with the Constitution, its supremacy and the laws shall be obligatory."*

Concerning the third problem, it is worth noting that this role of the Constitutional Court involves and requires great responsibility. We do not refer only to the solutions rendered by the Court, but also to their reasoning, as well as to the need for sound arguments for jurisprudential reversal whose frequency may be a disturbance factor for legal certainty.

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