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THE OBLIGATORY FORCE OF DECISIONS OF THE CONSTITUTIONAL COURT FOR OTHER COURTS AS A STABILISING FACTOR

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Stability is an essential characteristic of the Constitution. Back in 1789 the French Revolutionaries adamantly called for a Basic Law, stable and hierarchically superior to any other one.

To maintain the stability of the Constitution takes several intermingling factors, some of which are related to the procedure for the revision of the Constitution, while others to the enforcement of constitutional provisions, which includes their application by the courts of law. Throughout this process aimed at securing the stability of the Constitution, the Constitutional Court plays a key-role, as the guarantor of the supremacy of the Constitution.

In Romania as in other countries with a rigid constitution, the procedure for the revision of the Constitution is quite a seldom occurrence, as the constituent power instituted [for the purpose] is bound to respect the will of the Constituent Assembly in regard of the limits of revision and also of the procedural norms governing the revision process. Within this process, the Constitutional Court of Romania has the task to exercise, *ex officio*, its review on the draft law amending the Constitution prior to the onset of parliamentary debate. On the first – and thus far the only one – revision of the Constitution, the Constitutional Court, upon examination of the draft law amending the Constitution, held as unconstitutional two provisions: one that abolished a safeguard of private property – the presumption of lawful acquirement of wealth, another one that made decisions of the Magistrates' Superior Council circumvent judicial review, therefore breached upon the limits set for the revision of the Constitution, regarding human rights. Indeed, given the binding force of the Constitutional Court decisions, these provisions, which transgressed the limits for the revision of the Constitution, were stricken out from the draft law.

Speaking about the obligatory force of decisions of the Constitutional Court in relation to the courts of law, it is important to emphasize that under the Romanian Constitution either party in a case, the prosecutor, even the court itself, *ex officio*, are entitled to raise, at any level in the judicial system – an objection of unconstitutionality concerning the provisions of a law or of an ordinance issued by the Government by virtue of legislative delegation, on condition that the provision concerned is in force and the settlement of the case rests thereupon. A plea (objection) of unconstitutionality is directed at the conflict between that specific legal provision, and the principles and provisions of the Constitution. In other words, here at stake is the antinomy[1] between law or ordinance, on the one hand, and the Constitution, on the other. Such antinomies may be ostensible or real. The ostensible ones exist only in the mind of those who refer to the Constitutional Court an objection of unconstitutionality which is undoubtedly dismissed. Ostensible antinomies form the subject-matter for the great majority of objections of unconstitutionality. From 1992 to 2003, the Constitutional Court has dismissed 2,772 out of a total of 3,012 objections of unconstitutionality referred to, therefore endorsed the conformity of legal provisions challenged, to the constitutional norms. In such instances, the Constitutional Court decisions have triggered beneficial effects on the constitutional stability, building up confidence of the courts of law, but also of litigating parties and other partakers in the process of law-enforcement, that the legal provision examined under constitutional proceedings is valid and enforceable.

When it comes to real antinomies, the Constitutional Court admits the objection of unconstitutionality and declares the legal provision thus challenged as unconstitutional, therefore removes from effective legislation the provisions of laws and ordinances clashing with the Basic Law.

The question of the obligatory force of the Constitutional Court decisions has been an issue for ample discussion in literature but also for certain reactions from the courts. In its former wording, before revision in 2003, the Constitution of Romania stipulated that the Constitutional Court

[1] On antinomies in law, see Ch. Perelman, *Les Antinomies en Droit.*

decisions were binding and effective only for the future. This particular constitutional provision was given different interpretations in doctrine and in the courts' practice. Some courts of law, especially the highest one, considered that the Constitutional Court decisions produced effects merely *inter partes litigantes*. This viewpoint was argued while departing from the system of constitutional review of laws that had existed before World War II, when review had been carried out by the High Court of Cassation and Justice[2] whose decisions were effective only for the parties at trial. But this viewpoint obviously collided with the new Constitution of Romania, subject to which the constitutional review was a question of public order, so the Constitutional Court decisions were intended to engender effects *erga omnes*.

With a view to ensuring uniform application of constitutional provisions, it was necessary for the authority of constitutional jurisdiction to intervene; as the guarantor of the supremacy of the Constitution, it has established different solutions concerning the effects of its decisions, depending on whether it thereby dismissed, or admitted, an objection of unconstitutionality. Consequently, a decision dismissing the objection of unconstitutionality is not effective *erga omnes*, but only *inter partes*, which allows other legal subjects as well to raise an identical objection, in anticipation that the Constitutional Court may decide to change its jurisprudence and eventually admit the objection of unconstitutionality. As for decisions of admission, however, the Court held that "a normative provision found as unconstitutional shall no longer be applicable by any legal subject (the least so by public authorities or institutions), as henceforth it will cease effects *de jure*, namely as from the date of publication of the decision in the Official Journal of Romania.....".[3]

The Revision of the Constitution in 2003 has taken regard of the solutions consolidated into the Constitutional Court's case-law, so the new constitutional text now reads: "*Decisions of the Constitutional Court shall be published in the Official Journal of Romania. As from their publication, decisions shall be generally binding and effective only for the future*." This unequivocal proclamation of the generally binding force of the Court decisions has put an end to all possible controversy about the effects of decisions rendered in the admission of objections of unconstitutionality by the authority of constitutional jurisdiction.

This notwithstanding, a formal proclamation of the generally binding force of the Constitutional Court decisions cannot be seen in absolute terms, because – unless accounted for by proper arguments – their obligatory nature might as well turn into a conflicting factor against the stability of the Constitution, which eventually erodes the authority vested in the Constitutional Court.

In order to overcome antinomies, whether ostensible or real, the constitutional judge will resort to arguments drawn from gauging the legal provisions challenged as against the Constitution, international treaties on human rights and judgments of the European Court of Human Rights or from assessing the content of constitutional concepts. Accordingly, there are three types of decisions to single out in the case-law of our national authority of constitutional jurisdiction, namely: 1) decisions based on a comparison of challenged texts with the constitutional ones; 2) decisions that give precedence, in the interpretation of constitutional provisions regarding human rights, to international regulations, if more favourable; 3) decisions grounded on assessment of the content of constitutional concepts.

1. The first category consists of decisions based on a comparison of legal texts being challenged with constitutional provisions. In its comparative approach, the Constitutional Court will

[2] In Romania, the constitutional review was instituted as a 'judge-made' creation, in 1912, in the so-called "tramways' affair", later on overtly enshrined under the Constitution of 1923 and that of 1938.

[3] Decision no.169 of 2 November 1999, published in the Official Journal of Romania, Part I, no.151 of 12 April 2000.

confront certain provisions in a law or ordinance with those of the Constitution. Here we are dealing with a twofold interpretation: of the legal norm thus challenged and of the constitutional norm. But in both cases the interpretation is a complex process underpinned by grammatical, logical, historic, systematic or teleological (purpose-oriented) methods which are meant to reveal whether these two texts are consistent or contradictory with each other. If the legal provision matches up with the constitutional norm, the objection of unconstitutionality is dismissed, and the court of law is empowered to proceed to its application while settling the case.

Where the Court finds elements of discrepancy between the texts, the objection of unconstitutionality is admitted, the legal text declared as unconstitutional is rendered void and ceases effectiveness, while the court of law either makes direct application of the provisions of the Constitution in the settlement of the case or dismisses the parties' claims for fault of a legal text that confers subjective rights or legitimizes their own interest.

2. The second category comprises decisions that give precedence, in the interpretation of constitutional texts concerning human rights, to international regulations, if more favourable.

Subject to Article 20 of Romania's Constitution, "*(1) The constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.*

(2) Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party of, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions."

According to the above-cited constitutional text, the Constitutional Court is bound to give prevalence to relevant international regulations wherever it has to deal with antinomies between internal legislation and the Constitution.

In its jurisprudence, the Constitutional Court has resorted to the interpretation of constitutional texts through the prism of the Universal Declaration of Human Rights in 64 cases, of the International Covenant on Civil and Political Rights – in 39 cases, of the International Covenant on Economic, Social and Cultural Rights – in 23 cases, of the European Convention on the Adoption of Children and the Convention on the Rights of the Child – in 7 cases, of the International Labour Organization Conventions – in 13 cases, of the Framework Convention for the Protection of National Minorities – in 2 cases, of other international conventions – in 57 cases. A distinct occurrence in this subject-area is the European Convention on Human Rights to which the Court has made direct or indirect reference, through the prism of the case-law of the European Court of Human Rights, in no less than 340 cases. Decisions of the Constitutional Court rendered on the basis of arguments derived from international regulations, notably from the jurisprudence of the European Court of Human Rights have resulted into the building up and broadening of constitutional provisions to the point where they gradually levelled out conflicting judicial solutions rendered in the human rights area, setting out uniform practices by the courts.

The Constitution of Romania, for instance, stipulates that restrictions on the exercise of certain rights and freedoms may be imposed by law and only if necessary, as the case may be, for the defence of national security, public order, health, or morals, of the citizens' rights and freedoms, for conducting a criminal investigation, preventing the consequences of a natural calamity, disaster, or extremely severe catastrophe. Its interpretation based on international treaties has lead to the conclusion that its ambit of application concerning such restrictions should be construed in a broader sense, given the provisions under the Universal Declaration of Human Rights and the

International Covenant on Civil and Political Rights which take to the present wording of Article 10 in the Convention for the Protection of Human Rights and Fundamental Freedoms:

> "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary*."

This is the basis on which freedom of movement, the respect for the rights or freedoms of others, freedom of expression, the peaceful organisation, without arms, of meetings, the right to strike, the right of property, and other rights enshrined in the Constitution of Romania have acquired a new content, with beneficial consequences in creating uniform practices in the activity of the courts of law as well as on the level of building up democracy and the rule of law.

Furthermore, based on the case-law of the European Court of Human Rights, which regards misdemeanours as pertaining to criminal law, even though in most of the European countries such offences have been decriminalised and are held as administrative breaches, the Constitutional Court observed that the principle of non-retrospective criminal law was also applicable to administrative penalties, albeit at that moment not stipulated as such in the Constitution.

In view of that, an objection of unconstitutionality was raised directly by a court of law, in connection with an ordinance whose provisions stipulated that actions committed in the past ceased to be liable to sanctions if, at a later time, such was no longer treated as misdemeanour, claiming that was a case of retrospective law, forbidden under the Basic Law. Taking into account the assimilation between administrative, and criminal offences, in the case-law of the European Court of Human Rights, the Constitutional Court dismissed the objection of unconstitutionality, while stating that constitutional provisions on retrospective effects of the more lenient criminal law should be extended to the administrative law as well[4]. This solution, too, has been later on incorporated into the Constitution of Romania, on the occasion of revision.

Another example that illustrates how judgments rendered by the European Court of Human Rights have, because of their strong arguments, turned into a source of law for the Constitutional Court and, through its intermediate, for the other courts is a certain provision in the Family Code, enabling the husband alone to initiate an action in denial of paternity. The Constitutional Court, called upon to adjudicate on the objection of unconstitutionality regarding this legal text, held that a ban instituted under national law against the married woman and her child born during marriage to initiate such proceedings was unconstitutional[5]. This solution has taken regard of Article 8 under the European Convention on Human Rights and the arguments presented by the European Court of Human Rights in the case "Kroon and others v. The Netherlands".

3. The third category of decisions is rooted in the assessment of the content of constitutional concepts. The Constitution will inevitably operate with certain concepts or principles, but in fact their content implies a genuine legislative delegation instituted in favour of the interpreter. Such are the concepts that allow the extension of constitutional provisions, whose content, undefined by the

[4] Decision no.318 of 19 September 2003, published in the Official Journal of Romania, Part I, no.697 of 6 October 2003.

[5] Decision no.349 of 19 December 2001, published in the Official Journal of Romania, Part I, no.240 of 10 April 2002.

constituent law-maker, is variable depending on the developments in the social milieu. To exemplify, a summary inventory will include: social State, human dignity, justice, fair distribution of the tax burden, good-faith, discrimination, exceptional cases etc. On a constitutional level, the Court decisions which ascertain the content of these concepts have also reflected elements of novelty that should belong to the realm of constitutional norms, thus ensuring their stability against the pressure from political, social, moral, economic or technical changes in the social background. The meaning given to constitutional terms, as established by the Constitutional Court decision, is socially accepted, therefore it determines the state of constitutionality in society. But social environment will change, and transition involves, by definition, such change. Our society undergoes a profound process of transition towards a competition market-economy and higher democratic standards. Against this background, the state of constitutionality is caught inevitably in the evolution. Constitutional democracy is, by definition, a dynamic, constantly evolving state of affairs. That is why the social acceptance of constitutional norms will differ in time. Mainly because of its rigid character, the Constitution is a framework of stability but its interpretation will take, nonetheless, equal flexibility in order to adjust constitutional norms to the circumstances, often alert, of such changes.

An illustrative example in this sense is the principle of separation of powers in the State. In 1991, by the time when Romania's Constitution was adopted, the principle of separation of powers was embedded only in the Constitution of the Swiss Canton of Jura and that of Bulgaria. At that point, the experts of the Constitutional Drafting Committee deemed it was unnecessary to openly proclaim the principle in the Basic Law as long as it sufficed to have the constitutional edifice laid on its foundation. In its practice, the Constitutional Court had to proclaim the existence of the principle of separation of powers in the State in order to be able to deal, on this basis, with the objections of unconstitutionality of certain legal provisions that went earlier than the Constitution, subject to which the prosecutor or, as was the case, administrative authorities had been allowed to intervene in the process of administration of justice. In its decision, the Constitutional Court established that such legal norms affected "the principle of separations of powers in the State, a principle that can be surmised – even though not overtly proclaimed – from the entirety of constitutional regulations and, in particular, from those defining the functions of public authorities and their respective relations"[6].

This 'judge-made' consecration of the principle of separation of powers in the State underlies the positive solution rendered to numerous objections of unconstitutionality, such as where the Court declared unconstitutional certain legal provisions waiving – even on a temporary basis – the enforcement of court orders, because it amounted to an interference by the Legislative in the process of meting out Justice[7]. Likewise, the Court held that legal provisions which entitled the public administration authorities to review, or to annul or modify judicial decisions in relation to the court proceedings, i.e. for determination of a judicial stamp tax, came against the principle of separation of powers in the State[8]. In a different case, the Constitutional Court declared unconstitutional the provisions regarding the competence of the Court of Accounts to carry out checks over entities other than those which belong to the public sector. In the motivation of its decision, the Constitutional Court observed that the conduct of such checks contravened the principle of separation of powers in the State and denied the functional specialisation and delineation between the different categories of public authorities[9].

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[6] Decision no.73 of 4 June 1996, published in the Official Journal of Romania, Part I, no.255 of 22 October 1996.

[7] Decision no.6 of 11 November 1992, published in the Official Journal of Romania, Part I, no.48 of 4 March 1993.

[8] Decision no.127 of 27 March 2003, published in the Official Journal of Romania, Part I, no.275 of 18 April 2003.

[9] Decision no.463 of 4 December 2003, published in the Official Journal of Romania, Part I, no.43 of 19 January 2004.

The consecration by the Constitutional Court of the principle of separation of powers in the State has also captured interest of the constituent power instituted for the revision of the Constitution; accordingly, the following wording has been incorporated in the Basic Law: "*The State shall be organized based on the principle of the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy*." By this, the Constitutional Court decision has equally proved to be a factor of stabilisation and development of the Constitution.

It can be noticed that the interpreter has a decisive role to play in accepting novelty at the constitutional level. Stability of a constitution – the most striking example of which is the Constitution of the United States of America, adopted in the 18th century, but still in force today – should be accounted for, among other things, by the interpretation given to constitutional terms so as to ensure their applicability in whatever new conditions, this in spite of the practical impossibility for the constituent law-maker to have regard of, even to foresee all future developments. But the Constitution, more than any other law, is also a pledge with the future, where the key-role, the winning odds belong to the interpreter.

As a conclusion to what has been shown above, the obligatory force of decisions of the Constitutional Court for the courts of law is not just a factor of stability, but also of development of the Constitution. If the multifaceted social pressure exerted on the Constitutional Court by way of objections of unconstitutionality is a disturbing factor for constitutional stability, the act in response is the Constitutional Court decision, aimed at easing the conflict; and it does so by pointing out to the text of law based on which the court hearing the case, whether civil, criminal or any other, must pass judgment. Insofar its decisions have successfully absorbed the changes which occurred at the social level into their own substance, they will give new meanings to the terms of the Constitution, to the concepts which operate its machinery, and thus pave the way to perpetual renewal.