DEVELOPMENT OF CONSTITUTIONALISM IN ROMANIA

DOI: 10.47743/rdc-2015-1-0005

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I. Introduction

The adoption of the Constitution of Romania in 1991 marked the opening towards the values of the rule of law and the "reconnection" with the traditions of European constitutionalism[1]. For over half a century, the Basic Law, revised in 2003, has proven its durability, but also its flexibility, in the sense that it has proven adjustable according to inherent political and social changes.

This adjustment has been done largely through the Constitutional Court, set up according to the European model of constitutional review. Following the historical development of the State, reflected in the amendments of the Constitution and of the infra-constitutional legislation, through a growing dialogue at the international level with other constitutional courts and international and supranational courts, through an activism intended to give importance and authority to its decisions, the Constitutional Court of Romania has strengthened its role of guarantor for the supremacy of the Constitution, contributing substantially to the development of constitutionalism in Romania.

This study aims to present the fundamental pillars of this development, its embodiment and its meanings. At this point, we speak not only about the texts of the Constitution, but about these texts of the Basic Law as interpreted by the Constitutional Court. Therefore, this is a development of constitutionalism which must be taken into account in any ongoing or future revision of the Constitution.

Taking into account that the development of constitutions, and of constitutionalism, in general, is a constant phenomenon, which may be achieved, as a matter of principle,

[1] For a definition and characterization of the concept, see Fl.B. Vasilescu, *The end of a millenium: The victory of the European constitutionalism*, in the volume *Constitutionality and Constitutionalism*, Naţional Publishing House, Bucharest, pp. 13-33.

through two main routes, namely the revision of constitutions and their interpretation[2], we shall refer to both above-mentioned routes, with a focus on the second, *i.e.* that corresponding to the Constitutional Court's role in this process.

II. The Constitution of Romania. Originality, continuity, internationality

1. The adoption of the Constitution in 1991

The drawing up of the current Constitution of Romania started in July 1990, when the Parliament designated a Constitution Drafting Committee. That Committee was made up of 11 Deputies, 10 Senators and 5 experts in constitutional law. In its initial wording, the Constitution was published in the Official Gazette of Romania, Part I, no. 233 of 21 November 1991 and entered into force after its approval by the national referendum of 8 December 1991.

In drafting it, account was taken, according to Professor Vasile Gionea, member of the Constitution Drafting Committee and the first President of the Constitutional Court, to "our old democratic constitutions and foreign constitutions, borrowing ideas to the extent that they were consistent with the current state of political, social, cultural and economic development of the Romanian people, their traditions and aspirations"[3]. The short comment above highlights key features of the current Constitution of Romania, conferring upon it continuity, originality and internationality.

Thus, as concerns **continuity**, the same author, above quoted, noted that "after half a century of communist dictatorship, when constitutions inspired from Soviet constitutions were imposed on us, different from the nature, the will and the aspirations of our people, we went back to the old core principles of democracy, enshrined in the 1923 Constitution and which we have increased in the current Constitution, expressed more clearly and carefully, making them consistent with international treaties and conventions"[4]. Both the general principles contained in Title I of the Constitution, and the entire constitutional development, as a whole, show a strong commitment to the values of democracy, bringing together a past characterized by the commitment to these values reflected in the 1866 and 1923 Constitution of Romania , and a European present with the same orientation. In this way, any present and future changes are grafted onto a solid democratic foundation in line with the values promoted at European level. Moreover, they are the hard core of the Constitution, regulated by the provisions of Article 152 – *Limits on matters of revision*.

[2] We stated that, in principle, they are ways of development/transformation of the constitutions as the subject is much comprehensive and susceptible of many meanings – see in this regard the work *Les mutations constitutionnelles*, Collection Colloque, vol. 20, Société de législation Comparée, Paris, 2013, 2013.
[3] V. Gionea, *Studies of constitutional law and the history of law*, vol. I, R.A. Official Gazette, Bucharest, 1993, p. 27.
[4] *Idem*, *cited paper.*, vol. II, p. 12.

As concerns the continuity for the purpose of return and reconnection to values which, during the communist period, had a purely declaratory existence, we cannot disregard this historical period, its impact and lessons. It is this historical period the one that has led to certain elements of **originality** of the 1991 Constitution, as a reflection of the approach of the members of the Committee to insert in the Basic Law guarantees to prevent a repetition of profound injustices of the past[5]. The most obvious such elements are within the scope of fundamental rights, an issue which is moreover generally valid as concerns the imprint of each state constitutionalism since, as noted, protection of fundamental rights is a field where the national history and personal experience shape the constitutional law[6]. As regards the Constitution of Romania, we can mention by way of example the regulation of the principle of non-retroactivity of law, except the more favourable law which lays down penal or administrative sanctions, enshrined in Article 15 para. (2) of the Constitution, and the presumption of lawful acquisition of wealth, enshrined in Article 44 para. (8) of the Constitution. Considering its importance for the rule of law, *the principle of non-retroactivity of law*, enshrined in 1991 as having a sole exception, namely the more favourable criminal law, was raised to the rank of constitutional principle by the Romanian Constituent. Noting such legislative solution rarely found in constitutions, the Constitutional Court has underlined its significance as follows: "the consequences of including the principle of non-retroactivity in the Constitution are very severe and perhaps that is the reason for which this solution is not found in many countries, but, at the same time, raising it at the rank of constitutional principle is justified by ensuring legal certainty and public confidence in the legal system in better conditions, and because it blocks the disregard of the separation between the legislative power, on the one hand, and the judiciary or the executive power, on the other hand, thereby contributing to strengthen the rule of law"[7]. Also, in one of the separate opinions formulated by Judges of the Constitutional Court, it was noted that "the provisions of Article 15 para. (2) of the Constitution, which enshrines the principle of retroactivity of the more favourable criminal law, establish higher standards of protection of fundamental rights and freedoms. The principle of retroactivity of the more favourable criminal law is generally applicable and accordingly, it is not possible to be affected by other limitations without manifestly unconstitutional, besides the exceptions set out in the constitutional text itself regarding the more favourable criminal and contravention law". We refer to high standards in relation to international provisions on human rights. Such reasoning is achieved through the interpretation and implementation of Article 20 of the Constitution which "establish higher standards of protection of fundamental rights and freedoms, standards which cannot be lowered with reference to international acts. In this regard, according to Article 20 para. (2) of the Constitution, if there are any inconsistencies

[5] It is a feature of the post-communist constitutions which reflect, in one way or another, the experienced of the recent past, by clearly affirming certain principles to ensure its clear distinction – see, for example, K. Ujazdowski, *La caractère et la pratique de la Constitution polonaise du 2 avril 1997*, in *Les mutations constitutionnelles*, Collection Colloque, vol. 20, Société de législation Comparée, Paris, 2013, pp. 125-139.
[6] M. Tushnet, *Advanced introduction to comparative constitutional*, Edward Elgar Publishing, UK, 2014, p. 70.
[7] Decision no. 9/1994, published in the Official Gazette of Romania, Part I, no. 326 of 25 November 1994.

between covenants and treaties on fundamental human rights to which Romania is a party and internal laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions"[8]. *The presumption of lawful acquirement of wealth* is also unique in terms of regulation at the constitutional level[9]. Moreover, in respect of ownership, the experience to implement the regulations adopted during the communist period, in the context of a long period when the right to private property was almost devoid of content, determined that one of the main points of the debates in the Constituent Assembly on Theses of the draft of Constitution to be the regulation of guarantees of such fundamental right. One of these guarantees, when established, is the presumption of lawful acquirement of wealth. As the constituent legislature expressly noted, the reason of its establishment through the provisions of the Constitution was to ensure the legal certainty of the right to property. This concept has been addressed by the legislature in a report of opposition to the provisions of Law no. 18/1968, therefore its meaning which aims to protect citizens, their rights, as a guarantee against the adoption of regulations similar to those which allowed abuses and violations to the right to property in the previous period. In an established case-law pronounced on the initiatives to revise the Constitution which intended to remove the presumption of lawful acquirement of wealth, the Court ruled that this presumption is one of the constitutional guarantees of the right to property, and therefore its suppression was unconstitutional[10]. But we will come back further below to illustrate the evolutionary interpretation of this concept in constitutional case-law[11].

The international nature of the 1991 Constitution is particularly given by the express provisions which connect the Romanian Basic Law to the international treaties, especially to those on human rights. Thus, as underlined, "of all socialist states, the dictatorship had the most brutal and intolerant forms in Romania, and human rights were enshrined in the Constitution, not in order to be implemented in life, but only to mislead the people of the democratic world. Maybe it is precisely for this reason that the current Constitution has granted special importance to a broad and thorough human rights regulation"[12]. The provisions contained in Title II of the Constitution – *Fundamental rights, freedoms and duties* –, reveal the consistency of the acceptance of the documents and of the highest international standards in this matter. Concerning the incorporation in the Constitution of

[8] M.M. Pivniceru, V.Z. Puskas, T. Toader, *Dissenting opinion to Decision no. 511 of 12 December 2013,* published in the Official Gazette of Romania, Part I, no. 75 of 30 January 2014.

[9] For a thorough presentation, see M. Safta, *Presumption of lawful acquirement of property and confiscation of unlawfully acquired property in the case-law of the Romanian Constitutional Court. The reference constitutional framework for regulating the extended confiscation*, in "Tribuna Juridică" no. 1/2012, pp. 107-128, available at *http://www.tribunajuridica.eu*.

[10] Decision no. 85/1996, published in the Official Gazette of Romania, Part I, no. 211 of 6 September 1996; see Decision no. 148/2003, published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003, as well as Decision no. 799/2011, published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.

[11] Further, see T. Toader, M. Safta, *The Constitutionality of Safeguards on Extended Confiscation*, in "Journal of Eastern-European Criminal Law" no. 1/2015, pp. 9-22.

[12] V. Gionea, *cited paper*, vol. II, p. 7.

international instruments on human rights (otherwise a worldwide current trend[13] and perhaps the most important way by which constitutions are "international" or "internationalized"[14]), it was particularly noted the use of the Universal Declaration of Human Rights and of the Pacts to which Article 20 of the Constitution expressly refers. It is about a broad catalogue of fundamental rights, the establishment of the direct implementation and of the higher legal status in the domestic legal order of international human rights treaties to which Romania is a party and their application rules[15], enshrined in Article 20 of the Constitution. In fact, Article 20 of the Constitution establishes in the basic law what is commonly called "block of constitutionality" which ensures the international nature of the Constitution of Romania, a better protection of fundamental rights and freedoms, but which caused a challenge and a difficult burden firstly on the exercise of the constitutional review, namely concerning the acceptance of the international regulations and of the case-law of international courts, avoiding conflicts and any tensions that may arise in this process.

2. Revision of the Constitution in 2003

On this basis and in view of a fundamental change in the socio-political framework, namely the preparation for accession to the European Union, the Constitution adopted in 1991 was amended and supplemented by the Law no. 429/2003 for the revision the Constitution[16].

Commenting on the significance of the law for the revision of the Constitution of Romania, Constantin Doldur, former judge of the Constitutional Court, noted that it is "a vital landmark in the constitutional evolution of our country. The amendments made by all 79 points of revision, in respect of half of the texts of the Basic Law, have taken as a central objective to ensure the constitutional grounds for integration in the European Union and accession to NATO. At the same time, the revision of the Constitution has also prompted a closer rapprochement to common constitutional traditions in the European Union member countries as well as harmonisation with the European acquis. Among the most important changes brought to constitutional regulations, whose ambit has practically envisaged all of

[13] Wen-Chen Chang, Jiun-Rong Yeh, *Internationalization of constitutional law*, in "The Oxford handbook of comparative constitutional law", Oxford University Press, 2012, p. 1167.

[14] See, for the relation of enshrining fundamental rights – constitutional review: R. Hirschl, *Towards juristocracy. The origins and consequences of the new constitutionalism*, Harvard University Press, 2007, pp. 17-30.

[15] Further, for examples at international level, see: Wen-Chen Chang, Jiun-Rong Yeh, *cited paper*, p. 1168; Fl.B. Vasilescu, *cited paper*, pp. 23-25.

[16] Published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 and then republished, with the updated names and renumbered texts, in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003. Law for the revision of the Constitution no. 429/2003 approved by the national referendum of 18-19 October 2003 and entered into force on 29 October 2003, the date of publication in the published in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003, of the Ruling of the Constitutional Court no. 3 of 22 October 2003 in order to confirm the result of the national referendum of 18-19 October 2003 on Law for the revisions of the Constitution of Romania.

the chapters in the Basic Law, with direct consequences on strengthening the rule of law, is that regarding the activity of the Constitutional Court"[17].

Also in relation to the analyzed coordinates, the novelties were the improvement and the refinement of the fundamental rights catalogue, the introduction of certain rules to "connect" with the European Union law, by the provisions of Article 148 – *Integration in the European Union* – and the strengthening of the Constitutional Court as a guarantor for the supremacy of the Constitution. The use of the Convention for the Protection of Human Rights and Fundamental Freedoms, to which Romania acceded meantime, is visible this time, as well as the use of case-law of the European Court of Human Rights, even in terms of transforming the originality to which we have referred above. Thus, for example, the principle of non-retroactivity of the law has acquired a new exception – the more favourable law as a result of acceptance of the above-mentioned case-law.

3. Other initiatives for the revision of the Constitution

There have been other initiatives for the revision of the Constitution, of origin:

a) parliamentary, upon which the Constitutional Court adjudicated by:

- **Decision no. 85 of 3 September 1996 on the constitutionality of the initiative for the revisions of the provisions of Article 41 para. (7) of the Constitution of Romania**[18]

The Court found that "the legislative proposal for the revision of the provisions of Article 41 para. (7) of the Constitution is unconstitutional as it would result in the suppression of certain guarantees of the right to property, therefore, being in violation of the limits on matters of revision provided for in Article 148 para. (2) of the Constitution".

- **Decision no. 80 of 16 February 2014 on the legislative proposal for the revision of the Constitution of Romania**[19]

The Court held the following elements of unconstitutionality: "*Since it infringes the limits on matters of revision set forth in Article 152 of the Constitution:*

1. by majority vote, the Court finds unconstitutional the supplementation of Article 3 of the Constitution with a new paragraph, paragraph (3^1), relating to the possibility of recognizing the traditional areas as administrative subdivisions of the regions;

2. by majority vote, the Court finds unconstitutional the supplementation of Article 6 of the Constitution with a new paragraph, paragraph (1^1), relating to the possibility of the legal representatives of national minorities who may establish, according to the statute of national minorities adopted by law, their decision-making and executive bodies;

3. by majority vote, the Court finds unconstitutional the supplementation of Article 12 of the Constitution with a new paragraph, paragraph (4^1), relating to the use of the national minorities' own symbols;

[17] C. Doldur, *Constitutional review in light of new provisions under the revised Constitution*, in "The Constitutional Court Bulletin" no. 7/2004, pp. 11-14, available at *www.ccr.ro*.
[18] Published in the Official Gazette of Romania, Part I, no. 211 of 6 September 1996.
[19] Published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014.

4. by unanimous vote, the Court finds unconstitutional the amendment to Article 15 para. (1) of the Constitution, relating to the introduction of the phrase «Romanian citizens are born free and live freely»;

5. by unanimous vote, the Court finds unconstitutional the amendment to Article 21 para. (4) of the Constitution, relating to the abolish of the optional nature of special administrative jurisdictions;

6. by unanimous vote, the Court finds unconstitutional the supplementation of Article 23 of the Constitution with a new paragraph, paragraph (13^1), relating to the use of illegally obtained evidence;

7. by unanimous vote, the Court finds unconstitutional the amendment to Article 26 para. (2) of the Constitution, relating to the abolish of the term «morals»;

8. by majority vote, the Court finds unconstitutional the amendment to Article 28 of the Constitution, relating to the secrecy of correspondence;

9. by majority vote, the Court finds unconstitutional the supplementation of 32 para. (8) of the Constitution, relating to the definition of university autonomy;

10. by majority vote, the Court finds unconstitutional the supplementation of Article 37 of the Constitution with a new paragraph, paragraph (2^1), relating to the condition of having had the residence in Romania at least six months before the date of the elections for the Senate, the Chamber of Deputies and the office of President of Romania;

11. by unanimous vote, the Court finds unconstitutional the removal of second sentence of Article 44 para. (1) of the Constitution, relating to the content and the limits of the right to property;

12. by unanimous vote, the Court finds unconstitutional the amendment to Article 50 of the Constitution, relating to the suppression of special protection enjoyed by disabled people;

13. by unanimous vote, the Court finds unconstitutional the amendment to Article 52 para. (1) of the Constitution, relating to the removal of the full reparation for the damage suffered by the person aggrieved by a public authority;

14. by unanimous vote, the Court finds the unconstitutionality of replacing the term «individual» with the term «citizens» in Article 58 para. (1) of the Constitution;

15. by majority vote, the Court finds unconstitutional the supplementation of Article 58 para. (1) of the Constitution with the term «in their relations with public authorities»;

16. by majority vote, the Court finds unconstitutional the supplementation of Article 64 with a new paragraph, paragraph (4^1), relating to the obligation of any person of public law, private legal person and individual to appear, directly or through legal representative, as appropriate, before a parliamentary committee;

17. by majority vote, the Court finds unconstitutional the supplementation of Article 70 para. (2) letter e) relating to the cessation of the capacity as Deputy or Senator on the date of resignation from the political party or formation on behalf of which he/she was elected or on the date of his/her registration to another political party or formation;

18. by unanimous vote, the Court finds unconstitutional the removal of second and third sentences of Article 72 para. (2) relating to the competence of the Public Prosecutor's Office

attached to the High Court of Cassation and Justice to carry out the search and prosecution and the competence of the High Court of Cassation and Justice for settlement of case relating to Senators and Deputies;

19. by majority vote, the Court finds unconstitutional the amendment to Article 103 para. (1) and (3) of the Constitution, as well as the supplementation of Article 103 of the Constitution with three new paragraphs, paragraphs (3^1)-(3^3), relating on the way by which the President of Romania shall designate a candidate for the office of Prime Minister;

20. by unanimous vote, the Court finds unconstitutional the amendment to Article 110 para. (1) of the Constitution, relating to the Government's term of office;

21. by unanimous vote, the Court finds unconstitutional the introduction of paragraph (2) under Article 119 of the Constitution on the binding nature of the decisions of the National Security Council;

22. by majority vote, the Court finds unconstitutional the amendment to the introductory part and to Article 133 para. (2) letter b), relating to the increase in the number of the members of Superior Council of Magistracy, representatives of civil society;

23. by unanimous vote, the Court finds unconstitutional the amendment to Article 135 para. (2) letter d), relating to exploitation of the production resources with maximum economic efficiency and by granting non-discriminatory access to all those interested;

24. by unanimous vote, the Court finds unconstitutional the amendment to Article 135 para. (2) letter e), relating to economic development while safeguarding the environment and maintaining an ecological balance;

25. by unanimous vote, the Court finds unconstitutional the repealing of Article 146 letter l) of the Constitution, insofar as it is not accompanied by the duly constitutionalisation of the Constitutional Court's powers to review the law for the revision of the Constitution adopted by Parliament and, respectively, to review the constitutionality of the resolutions of the plenum of the Chamber of Deputies, of the resolutions of the plenum of the Senate and of the resolutions of the two Joint Chamber of Parliament that affect constitutional values, rules and principles or, where appropriate, the organisation and operation of constitutional authorities and institutions.

26. by unanimous vote, the Court finds unconstitutional the amendment to Article 148 para. (2), according to which Romania shall ensure observance, within its national legal order, of the European Union law, according to the obligations undertaken through the accession document and the other treaties signed within the Union".

b) presidential, on which the Constitutional Court adjudicated by **Decision no. 799 of 17 June 2011**[20]:

The Court held the following element of unconstitutionality:

"(...) *2. By majority of vote, the Court finds that the removal of second sentence of Article 44 para. (8) of the Constitution, according to which «Lawfulness of acquirement shall be presumed» is unconstitutional as it results in the suppression of a guarantee of the right*

[20] Published in the Official Gazette of Romania, Part I, no. 440 of 23 June 2011.

to property, in violation of the limits on matters of revision set forth in Article 152 para. (2) of the Constitution.

3. By majority of vote, the Court finds that the amendment to para. (2) and the removal of para. (3), both in Article 72 of the Constitution, are unconstitutional as it results in the suppression of a fundamental right of a person occupying the public office, being in violation in violation of the limits on matters of revision set forth in Article 152 para. (2) of the Constitution.

4. By majority of vote, the Court finds that the repealing of para. (2) and the amendment of para. (3) of Article 109 of the Constitution are unconstitutional as it results in the suppression of a fundamental right of a person occupying the public office, being in violation of the limits on matters of revision set forth in Article 152 para. (2) of the Constitution.

5. By majority of vote, the Court finds that the amendment of Article 126 para. (6) of the Constitution, relating to the introduction of the term «and those relating to fiscal and budgetary policies of the Government, under the terms of the administrative disputes law» is unconstitutional as it results in the suppression of free access to justice, being in violation of the limits on matters of revision set forth in Article 152 (2) of the Constitution.

6. By majority of vote, the Court finds that the amendments of Article 133 para. (2) letters a) and b) and para. (3) are unconstitutional as they result in the infringement of the independence of justice, contrary to Article 152 para. (1) of the Constitution".

c) popular, on which the Constitutional Court adjudicated by:

- **Decision no. 82 of 27 April 2000**[21]

The Court held that "*the legislative initiative for the revision of the constitutional provisions of Article 41 para. (2), first sentence does not violate the provisions of Article 148 of the Constitution, relating to the limits on matters of revision*";

- **Ruling no. 6 of 4 July 2007**[22]

The Court held that "*the citizens' legislative initiative for the revision of the Constitution of Romania, regarding Article 48, published in the Official Gazette of Romania, Part I, no. 536 of 21 June 2006, does not meet the conditions set forth in Article 150 of the Constitution*", namely it does not meet the cumulative condition of territorial dispersion in counties and in Bucharest, provided for in Article 150 para. (2) of the Constitution.

The procedure for adopting laws for revision was not completed in any of the above-mentioned cases, either following the ascertainment of the unconstitutionality of the initiatives for revision or the lack of political will in this regard.

We have presented part of the operative part of the instruments pronounced by the Constitutional Court in this matter as their examination, in their chronology, is particularly relevant for the objectives of this study. It should be noted not only the more elaborate nature of their recitals and operative part, over time, but, above all, the use of its own case-law, developed and strengthened, by the constitutional court. More specifically, even

[21] Published in the Official Gazette of Romania, Part I, no. 193 of 4 May 2000.
[22] Published in the Official Gazette of Romania, Part I, no. 540 of 8 August 2007.

judging the limits of the revision was accomplished through the constitutional concepts in the interpretation given by the Court, explained with reference to its case-law, especially visible in Decision no. 80/2014. It is a process of "building"/"modelling"/"remodelling" of constitutional concepts developed over time and as an effect of the constitutional review, in the spirit of "living Constitution"[23], adapted and adaptable to the complex reality and constantly changing. It is an ongoing and irreversible process, without which the very meaning of the Constitution cannot be uniformly and consistently understood, and which influences equally the legislative process, the law enforcement, the legal doctrine, the entire system of law[24]. In a plastic expression, "the constitutional judge rules by the interpretation of the Constitution"[25], meaning that decisions delivered by them may be attached, due to their general binding nature, the attribute of "*normative power*"[26]. Given this role and its importance in the general development of constitutionalism, we will further refer to the beginning, the institutional strengthening of the Constitutional Court and the development of the constitutional review in Romania.

III. The Constitutional Court. Development and institutional strengthening

1. Between 1992 and 2003

1.1. Constitutional regulation. Powers and effects of decision

The 1991 Constitution enshrined in Romania the European model of constitutional review of laws, being established the Constitutional Court as an authority independent from any public authority, with the role of guarantor for the supremacy of the Constitution. The Romanian framer could not continue here a tradition because at that moment we could not refer to a tradition of constitutional review in Romania, but to previous attempts, although notably, to take over models of constitutional review, but with a temporal existence and sporadic operation. Thus, after a short period of time, specifically from 1912 until 1923 when it worked the American model of constitutional review (just few examples could be given in this regard), judicially imposed, it was enshrined the constitutional review exercised

[23] "Living constitution", see: H. McBain, *The Living Constitution,* 1927; W.H. Renquist, *The notion of living Constitution*, in Texas Law Review, 1976, nr. 54, p. 693.
[24] Further, in this regard, see also T. Birmontiene, *The influence of constitutional review on modern trends of constitutional law*, in Classical and modern trends in constitutional review, Feneya Publishing House, Sofia, 2012, pp. 163-176.
[25] A. Stone Sweet, *Constitutional Courts*, in "The Oxford Handbook of comparative constitutional law", Oxford University Press, 2012, p. 827.
[26] I. Deleanu, S. Deleanu, *Case-law and jurisprudential upturn*, Universul Juridic Publishing House, Bucharest, 2013, p. 69.

by the High Court of Cassation and Justice, institutionalized through the 1923 Constitution[27] and maintained by the 1938 Constitution. After the Second World War, there was no constitutional review of laws (the Constitutions of 1948 and 1952). Even though the 1965 Constitution stipulated that the Grand National Assembly shall "*exercise the general control of the application of the Constitution. Only the Grand National Assembly shall decide on the constitutionality of laws*"[28], actually there is no such control.

As a result, the Constituent Assembly discussed different options: the European model, the American one and even the old communist system of self-review, but in parallel with the external review of the constitutionality of laws[29]. In essence, the topics of debate were the classic issue of the supremacy of Parliament, generally characterizing the establishment of the constitutional review[30] and – in essence – the two models of constitutional review – diffuse or concentrated –, namely two types of courts to perform this review – specialized of the common or special jurisdictions, separate from them. The Romanian framer's option was ultimately the European model of constitutional review, by a single court, special, specialized; an option in line with the developments at European level at the time of adoption of the Constitution in 1991. In addition, between the two World Wars and especially after the Second World War, more and more states have turned to the European model of constitutional review[31]. For example, since 1990, the countries of Central and Eastern Europe – except Estonia – have opted for this model. The European model, quite rightly preferred by the Romanian framer, "avoids divergent interpretations that may arise between courts (for example, the American diffuse review), immediately offering the sole solution to the issue of constitutionality. The case brought before the Court solely refers to the constitutionality of a law and the delivered decision has *erga omnes* effects, so not only for litigants"[32]. Commenting on this historic moment, Lucian Mihai, former president of the Constitutional Court, underlined that "until the Constitution of 1991, there has never been such a public authority in the constitutional history of Romania. In Romania there had been the Parliament, the country's Presidency Office, the Government, the Supreme Court of Justice, the Court of Audit, but no Constitutional Court before June 1992, when the current Constitutional Court started its activity according to Law no. 47/1992 on organization and operation of the Constitutional Court", which is "one of the main recitals for which the setting out of the Constitutional Court was contested"; "but the necessity of being in line with the European model prevailed, being a well-known fact in the majority of European

[27] According to Article 103 para. (1) of the Constitution of Romania in 1923: "Only the Court of Cassation in joint sections is allowed to adjudicate on the constitutionality of laws and to declare as inapplicable those which are contrary to the Constitution. The judgment on the unconstitutionality of laws is limited only for the judged case".
[28] Article 43 point 15.
[29] I. Vida, *The Constitutional Court of Romania. The justice of politics or the politics of justice*, Official Gazette Publishing House, Bucharest, 2011, p. 18.
[30] See, for conclusions of comparative law, M. Tushnet, *cited paper*, pp. 40-69.
[31] S. Dürr, *Comparative Overview of European Systems of Constitutional Justice*, vol. 5, nr. 2/2011, p. 159, available at *www.icl-journal.com*.
[32] D. Rousseau, *La justice constitutionelle en Europe*, Montchrestien, Paris, 1992, pp. 22-23.

countries (but also in other continents), a distinct authority of constitutional jurisdiction is operating, being mostly called the Constitutional Court or Tribunal"[33].

The 1991 Constitution expressly and exhaustively established the powers of the Constitutional Court in Article 144, namely: the constitutional review of laws before promulgation, the constitutional review of Parliament Regulations, resolve the exceptions raised before courts on the unconstitutionality of laws and ordinances, the power to supervise the observance of the procedure for the election of the President of Romania and to confirm the results of the suffrage, to ascertain the existence of circumstances which justify the interim in the exercise of the office of President of Romania, and to report its findings to the Parliament and to the Government, to give advisory opinion on the proposal to suspend the President of Romania from office, to supervise the observance of the procedure for the organization and carrying out of a referendum and to confirm its results, to verify the fulfillment of the conditions for the exercising of the legislative initiative by the citizens, to decide on the objections regarding the constitutionality of a political party.

As concerns the acts of this Court, Article 145 of the 1991 Constitution stated that: "*(1) In cases of unconstitutionality ascertained in accordance with Article 144 letters a) and b), the law or the regulation shall be returned for reconsideration. If the law is adopted in the same wording, with a majority of at least two thirds of the members of each Chamber, the objection of unconstitutionality is removed, and promulgation becomes binding. (2) Decisions of the Constitutional Court are binding and with effects only for the future. They shall be published in the Official Gazette of Romania*".

In terms of influences regarding the name and the powers of the new institution, the French and the Italian model were combined, "which resulted in the establishment of a strong public authority of constitutional review of laws"[34]. However, this authority was tarnished by the way in which the effects of the decisions of the Constitutional Court were initially regulated, in the sense of preservation of a prevalence of Parliament through its ability to reverse the decisions pronounced by the Court within a priori review, under the conditions determined by the constitutional text. Constantin Doldur expressed his view that "the limitation placed on the Constitutional Court prerogatives through the Basic Law, and also some reluctance to lay down regulations about the effects of the decisions to be delivered by the Court originated in the Constituent Assembly's scepticism in embracing the brand new idea to establish a Constitutional Court, but also in a deeply rooted conception, in our country just like elsewhere, that the elected representatives of the nation must always have the last word to say in the lawmaking. The debates of the Constituent Assembly clearly voiced a certain fear against "*some discretionary body that could get as far as to censure Parliament without any possibility to have control or contestation*"[35].

The Constitutional Court of Romania was established on 6 June 1992 under Articles 140-145 of the Constitution.

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[33] M. Lucian, *Beginning the work*, in "The Constitutional Court Bulletin" no. 1/1999, available at *www.ccr.ro*.
[34] I. Vida, *The Constitutional Court..., cited paper*, p. 27.
[35] C. Doldur, *Constitutional review..., cited paper*, pp. 11-14, available at *www.ccr.ro.*

1.2. Infra-constitutional Regulation. Procedural issues

The constitutional rules of reference on the Constitutional Court were detailed in an organic law and adopted as Law no. 47/1992 on the organization and operation of the Constitutional Court[36]. The Drafting Committee of the organic law of the Court "did not follow the model of a certain state, it consulted the laws of organization and operation of the European states and even of other democratic states overseas, it was inspired by them and adapted them to our social, economic and legal realities. In particular, the Italian, Portuguese, Spanish, French and German models were used"[37].

Most provisions of this law, in the initial wording, were also kept in the current regulation (rules of competence, organization and operation of the Court, the relations with different partners of dialogue, Status of the Judges the Court), with a notable exception, namely on the procedure to resolve the exceptions of unconstitutionality, which included two levels of jurisdiction. Thus, the exception of unconstitutionality should be firstly settled by a panel of three judges and, if the decision was appealed, by a panel of five judges, other than those who formed the first panel of judges. On this solution, Mihai Constantinescu, former judge of Constitutional Court, stated that "except the fact that it did not strictly comply with the provisions of Article 140 para. (1) of the Constitution, according to which the Court is composed of nine judges, it also resulted in many operational shortcomings. Thus, the three judges of the appeal could require the solution, while the other two judges, as judges of the first panel, so five judges in total, had a contrary opinion. The settlement of the exception at first instance and on appeal resulted in an unjustified extension of the procedure and in an unwieldy activity – summons, decisions and reports for each panel of judges – but also in an increase of travel and representation expenses of the Parties"[38]. Incidentally, this issue had been submitted since the first years of operation of the Court and Vasile Gionea proposed in one of his studies that "in all cases, judgments shall take place in the Plenum, and not in two phases. Such decisions shall be final and binding. To judge disputes in two phases diminishes the authority of the Court"[39].

Law no. 138/1997[40] amended and supplemented some provisions of Law no. 47/1992, amendments which constitute "a result of the experience gained since the establishment of the Court in 1992"[41], as well as of the "greater"[42] takeover of the rules similar to the relevant European procedures. Thus, with regard to constitutional contentious, the main innovation noted by us as essential for the analyzed subject, was abolition of appeals. The new regulation, namely the settlement of all cases only in the Plenum of the Constitutional Court means the unitary character of constitutional review, the high importance of the

[36] Published in the Official Gazette of Romania, Part I, no. 101 of 22 May 1992.
[37] V. Gionea, *cited paper*, vol. III, p. 32.
[38] *Ibidem*, p. 19.
[39] *Ibidem*, p. 54.
[40] Published in the Official Gazette of Romania, Part I, no. 170 of 25 July 1997.
[41] M. Constantinescu, *The amendment of procedures for the settlement of the exceptions of unconstitutionality*, in "Dreptul" no. 11/1997, pp. 15-20.
[42] *Ibidem*.

decisions of the Constitutional Court, efficiency. Likewise, one of the main "innovations" of this law, as characterized by Ioan Muraru, former president of the Constitutional Court, and Mihai Constantinescu, former judge, was the establishment of the cases of inadmissibility[43] on the exceptions of unconstitutionality, through which, practically, courts were "associated" with constitutional review, in the sense of "filtration" of those exceptions of unconstitutionality found inadmissible. The experience gained over the years since such amendments were applied to Law no. 47/1992, has shown, however, that this filter does not always work, pointing out judiciously, from this perspective, that "*de facto*, the courts have divested themselves this power and increasingly started to send systematically to the Constitutional Court almost all exceptions of unconstitutionality brought before them, regardless of their real appropriateness or relevance, determining thus the constitutional jurisdiction to take action by applying at its level the conditions for inadmissibility which should have been verified at *ad quem* level"[44]. Therefore, even if the filtration of the exceptions of unconstitutionality through the cases of inadmissibility, expressly covered by Article 23 (currently Article 29) of Law no. 47/1992, was conferred by the legislature in the competence of courts, their passivity or unwillingness to use this filter caused and still causes the intervention of the Constitutional Court, in order to reject as inadmissible the exceptions of unconstitutionality that violate Article 29 para. (1) and (3) of Law no. 47/1992. It is an intervention that gives full expression to the role exercised by the Constitutional Court since "the inadmissibility, being public, cannot be covered by the fact that the court did not ascertain it, and the decision of the Court, because it concerns its constitutional competence, cannot be challenged by any public authority, in accordance with Article 3 para. (3) of Law no. 47/1992. Therefore, it also rules before the court which referred it, and also before any other public authority"[45].

As concerns the competence of the Court, Ioan Vida, former president of the Constitutional Court, also underlined, on the same occasion, the supplement of Article 2 of Law no. 47/1992, stating that "the exclusion of the possibility of the Court to rule on the state of affairs constitutes a delimitation between courts and the Constitutional Court, allowing the former to apply the justice and the constitutional court to decide on the legal issues which are limited to determine their meaning contrary to the Constitution"[46]. The same author noted, on the amendment to Law no. 47/1992 in 1997, that "on such legal provisions, the authority of the Constitutional Court has been strengthened, its decisions began to be taken into account by other public authorities and the constitutional contentious became a version increasingly credible for the defence of the rule of law, of human rights and liberties and of constitutional values"[47].

[43] I. Muraru, M. Constantinescu, *Cases of inadmissibility within the constitutional jurisdiction*, in "Dreptul" no. 2/1998, pp. 3-20.
[44] E.S. Tănăsescu, *cited paper*, p. 9.
[45] I. Muraru, M. Constantinescu, *Cases of inadmissibility..., cited paper*, p. 18.
[46] I. Vida, *The Constitutional Court..., cited paper*, p. 34.
[47] *Ibidem*.

1.3. Case-law of the Constitutional Court. Main elements to reinforce the status of the Court and the constitutional review

General considerations

Even if the constitutional regulation, developed by the organic law, have given substantial powers and a special status among public authorities, the main reinforcement of the Constitutional Court and the constitutional review are the fruit of its own work. The role and contribution of the Court in this regard were expressed, in fact, even since the first years of its operation, Florin Bucur Vasilescu, former judge and expert in the Drafting Committee of the Constitution, underlined in this respect that the constitutional court is required to defend the new democratic Constitution of the state, being a different role from that of the Western Constitutional Courts. This role is "a result of the initial stage of formation of the new political and post-totalitarian legal conceptions" determined by the transition stage to a democratic society, which "is so complex by its diversity, honourable honorable by the purposes that animate it"[48]. This stage of the Court "constitutes a process of revival of constitutionalism and democratic traditions [...]. For the first time in the states in this part of Europe it occurs a phenomenon of constitutionalisation of the branches of law under the influence and creativity of the Constitutional Courts, which increases the prestige of the Constitutions and the respect for their contents and sustainability is thus guaranteed"[49]. As concerns the way of the Constitutional Court to accomplish this mission, "firstly it is necessary to guarantee the credibility of the Court, of its decisions, as well as to accomplish its role, that of genuine guarantor for the rights and freedoms of citizens, as they are regulated by the Constitution".

Among the challenges/issues which the Court has faced and overcome during this period, those regarding the effects/authority of the acts of the Constitutional Court seem particularly relevant (in terms of the quoted comment, but also in terms of the studies published by the judges of the Constitutional Court during the period of reference), and those regarding the acceptance of the international law within the constitutional review (we clearly refer here to the interpretation and application of Article 20 of the Constitution – *International treaties on human rights*).

Issues on the effects of acts of the Constitutional Court under the 1991 Constitution

By far, as concerns the authority of the Court and its acts, most challenges were caused by the regulation of Article 145 para. (1) of the 1991 Constitution which provides that "In cases of unconstitutionality, in accordance with Article 144 letters a) and b), the law or regulation shall be returned for reconsideration. If the law is passed again in the same wording by a majority of at least two thirds of the members of each Chamber, the objection of unconstitutionality shall be removed, and promulgation therefore shall be binding". Commenting on this rule, Ioan Muraru and Mihai Constantinescu noted that "in such situation, when Parliament is left to decide in last resort on the constitutionality of its own

[48] Fl.B. Vasilescu, *cited paper*, p. 111.
[49] *Ibidem*, p. 109.

enactment, the very basic idea underlying the creation, by the new Constitution, of a Constitutional Court has been impaired"[50]. Therefore, an unconstitutional law could become constitutional by the will of a qualified majority of deputies and senators, without the revision of the Constitution. Even if it did not happen that the effects of any decision pronounced by the Constitutional Court within the review provided for in Article 144 letter a) of the Constitution be annihilated by a majority of at least two thirds of the members of each Chamber, the above-mentioned constitutional rule was liable to weaken the authority of the decisions pronounced by this Court.

As concerns the effects of the decisions pronounced in the exercise of other constitutional powers, another negative effect of the insufficient constitutional regulations results in the delay, sometimes very high, of the Chambers of Parliament to reconsider the provisions declared unconstitutional, according to Constantin Doldur[51]. An example appreciated by him as critical is the Regulations of the Senate, which was sent to this Chamber in order to reconsider the 29 texts found unconstitutional by Decision no. 46 of 17 May 1994 of the Constitutional Court and it had not been reconsidered until 2000, when the author wrote the article containing the critical remark. The same author underlined that, when the unconstitutionality of the regulations is found, there is no possibility to remove the effects of the Constitutional Court's decisions by a qualified majority. In this case, the reconsideration stipulated by the Constitution shall solely aim at the compliance of legal provisions with constitutional standards, by amending the Regulation already adopted by the Chamber, which means that Parliament, in the regulatory matter, shall observe the Court's decision, without the possibility to remove its effects (conclusion which is still valid today). Likewise, another issue, this time in relation to the courts, was the non-observance of the decisions pronounced for the settlement of the exceptions of unconstitutionality.

The Decision no. 1/1995 of the Plenum of the Constitutional Court on the obligation of its decisions pronounced within the constitutional review was pronounced in order to explain and to implement the constitutional norms[52], by which we noted as follows: "The constitutional review is completed by decisions which, according to Article 145 para. (2) of the Constitution, shall be binding and with effects only for the future. If the decision ascertains the unconstitutionality, it produces *erga omnes* effects, *i.e.* it has a generally binding effect aiming at all public authorities, citizens and legal entities of private law. Due to this fact, a not inconsiderable part of the constitutional doctrine compares these decisions with the legal acts. This conclusion can be easily drawn if we follow the effects of decisions in various situations of constitutional review:

a) the decision that allowed the exception of unconstitutionality makes the law or the ordinance declared unconstitutional or the text within them to no longer apply, as they were repealed by law;

[50] I. Muraru, M. Constantinescu, *The Constitutional Court of Romania*, Albatros Publishing House, Bucharest, 1997, p. 162.
[51] C. Doldur, *Consequences of the decisions of the Constitutional Court and the State governed by the rule of law*, in "The Constitutional Court Bulletin" no. 2/2000, available at *www.ccr.ro*.
[52] Published in the Official Gazette of Romania, Part I, no. 16 of 26 January 1995.

b) the acceptance of the challenge of unconstitutionality in connection with the Regulations of the Parliament makes the texts declared unconstitutional to be inapplicable and requires the Chamber concerned to reconsider these provisions in order to bring them into accord with the stipulations of the Constitution [Article 22 para. (4) of Law no. 47/1992];

c) the decision that allowed the objection of unconstitutionality of a law before promulgation shall also be generally binding and it shall not be ignored by anyone [...];

d) the decision that ascertains the unconstitutionality of the initiative for the revision of the Constitution shall obstruct the procedure for the revision provided for by Article 147 of the Constitution. Due to the generally binding nature of the decisions of the Constitutional Court, its case-law should be considered by all bodies involved in the drafting and application of laws and orders of the Government, as well as by the Chambers in the drafting or amendment of the Regulations of Parliament".

Noting further the tendency of certain courts, sometimes even of the supreme court, to deliberately pronounce solutions which were contrary to the decisions of the Constitutional Court and to continue the implementation of certain laws declared unconstitutional[53] and which faces, in exact cases, such positions of certain courts in relation to the enforceability of the decisions pronounced by the Constitutional Court, it resumed the cases, the recitals in the sense that "the decisions pronounced within the settlement of the exceptions of unconstitutionality not only produce relative effects, *inter partes*, within the process where the exception of unconstitutionality was raised, but also absolute effects, *erga omnes*"[54]. As a consequence of this nature, "the legal provision whose unconstitutionality has been found cannot be applied by any subject of law (even less by the public authorities and bodies), ceasing its legal effects for the future, namely from the date of publication in the Official Gazette of Romania of the decision of the Constitutional Court, according to the second sentence of the first phrase of Article 145 para. (1) of the Constitution. No doubt that after a decision is pronounced by the Constitutional Court by which it ascertains the unconstitutionality of a law or ordinance, Parliament or, where appropriate, the Government shall intervene in order to amend or repeal the normative act declared unconstitutional. But it does mean that, where such an action would not occur or would delay, the decision of the Constitutional Court would cease its effects. On the contrary, those effects still occur, being opposable *erga omnes*, in order to guarantee the supremacy of the Constitution, under Article 51 thereof"[55].

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[53] An example in this regard is Decision no. 3277 of 28 September 1999 of the Criminal Division of the Supreme Court of Justice, by which it is ascertained the applicability (on the merits of binding nature) of the Decision no. 486 of 2 December 1997 of the Constitutional Court, finding that "Article 278 para. (6) of the Code of Criminal Procedure is unconstitutional insofar as the person unsatisfied with the settlement of the application against the measures and the acts accomplished by the prosecutor or taken based on the provisions given by him/her and which are not raised before the courts shall not be prevented from presenting before the court under Article 21 of the Constitution, which is to be directly enforced".

[54] Decision no. 169 of 2 November 1999, Published in the Official Gazette of Romania, Part I, no. 151 of 12 April 2000.

[55] *Ibidem*.

The same case-law also emphasizes the responsibility for the non-observance of the decisions of the Court, noting that «in this respect there is an equivalence with the situation where a law passed by Parliament or an ordinance issued by the Government is not complied with. Or, in more general terms, we refer to the issue on identifying the legal liability when one of the State authorities refuse to implement the measures established by another State authority, within the jurisdiction conferred by the Constitution. In such a situation the identification of legal liability arises from the mandatory nature of the provisions of Article 1 para. (3) of the Constitution, according to which "*Romania is governed by the rule of law* [...]". Otherwise it would lead to the removal of this fundamental constitutional principle by one of the powers of the state, which is unacceptable. Also, in light of the provisions of Articles 11 and 20 of the Constitution, the legal responsibility for the non-observance of a decision of the Constitutional Court may consist in a judgment pronounced by the European Court of Human Rights against Romania, insofar as the conditions laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms are complied with".

In conclusion, the above-mentioned study noted that "these concerns of the Constitutional Court for the observance of constitutional provisions and of those contained in Law no. 47/1992, regarding the effects of the decisions pronounced by the Court, are not sufficient to avoid, in the future, that public authorities required to apply the decision of the Court fail to apply them. During the necessary procedures to eliminate such unconstitutional behaviours, deeply harmful for the idea of strengthening the rule of law, we believe it would be beneficial to take into account the amendment of the constitutional texts regarding the effects of the decisions of Court, within the projects for the revision of the Basic Law which has been so much discussed lately. Likewise, within the existing regulatory framework, the increase in the future of the Government's concern to intervene more swiftly through draft bills amending laws that include texts declared unconstitutional by the Constitutional Court and to verify the compliance with the decisions of the Court by all its subordinated authorities, is noted as absolutely necessary procedures, in consultation with the parliamentary majority, in order to guarantee the compliance of laws with the Constitution".

These jurisprudential procedures, as well as the doctrinaire ones, many of which come from within the Court, by the authority of direct experience, have found their purpose during the process for the revision of the Constitution in 2003 and this regulatory on the effects of the Constitutional Court's decisions has resulted from a process of awareness and affirmation of the role of the Constitutional Court and the constitutional review in general.

Acceptance of international law within the constitutional review under the 1991 Constitution

An important event of the period of reference with an impact on the case-law of the Constitutional Court and, thereby, on the development of constitutionalism, was the fact

that Romania joined the Council of Europe on 7 October 1993. By the Law no. 30/1994[56], Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms, thus this act integrated in the "block of constitutionality" covered by Article 20 of the Constitution of Romania, establishing the legislative position of international human rights treaties and their constitutional interpretative value. The great difficulty in this context, otherwise common for all states whose constitutions provide such a type of incorporation of certain international rules[57] was the acceptance of the case-law of the European Court of Human Rights by the Constitutional Court. Having analysed this issue, the Constitutional Court of Romania noted in several decisions that "*the ratification by Romania of the Convention for the Protection of Human Rights and Fundamental Freedoms, by Law no. 30 of 18 May 1994, made this Convention to be part of the domestic law, where the reference to any of its texts is subject to the same regime as the one which applies to the provisions of the Basic Law*"[58]. The Constitutional Court established the same binding nature for the interpretation given by the European Court of Human Rights to the texts of the Convention, while the constitutional examination is often accomplished under the constitutional provisions of Articles 11 and 20, and in relation to the practice of this court. According to a study carried out in 2005[59], during 1994-2003 the Constitutional Court based about 380 of its decisions (of nearly 3000 pronounced in this period) on the text of the Convention for the Protection of Human Rights and Fundamental Freedoms and on case-law of the European Court of Human Rights. This demonstrates the formation of the bases and the development of the dialogue with the European Court of Human Rights, a dialogue which led to a language and common standards in order to ensure the protection of human rights and fundamental freedoms. The provisions of Article 20 of the Constitution determined that the European Court be more than just a dialogue partner, and its case-law constitutes a binding framework of reference for the Constitutional Court of Romania, with the circumstantiations determined by the role and the limits of competence of the constitutional court. The Romanian constitutional judge assumed the role and the authority to ensure the acceptance of the Convention and the practice of the European Court, with effects both in order to regulate the issues on fundamental rights and freedoms (as it will be shown, including at constitutional level) and to apply these regulations by national courts. In the practice of the constitutional court of that period we can identify both decisions which give priority to the provisions of the Convention, when they are more favorable, within the interpretation of constitutional texts on human rights, and decisions based on the provisions of the Convention and on their interpretation given by the European Court of Human Rights, within the determination of the content of the constitutional concepts. It should also be noted that, in quite many cases, the acceptance of the case-law of the European Court of Human Rights was the basis of certain jurisprudential upturns[60].

[56] Published in the Official Gazette of Romania, Part I, no. 135 of 31 May 1994.
[57] See M. Tushnet, *cited paper*, p. 92.
[58] Decision no. 146/2000, published in the Official Gazette of Romania, Part I, no. 566 of 15 November 2000.
[59] See *Case-law of the Constitutional Court and the European Convention of Human Rights – www.ccr.ro*.
[60] For examples, see T. Toader, M. Safta, *Changes in the constitutional case law*, available at *www.ssrn.com*.

A report

The conclusions on the development of the Constitutional Court, on the constitutional review and on the constitutionalism in Romania, between the date of adoption of the Constitution and that of its revision, were essentially presented by Nicolae Popa, former president of the Constitutional Court, on the celebration of 10 years since the establishment of this Court. In his speech on this occasion[61], he underlined the reservations against the Constitutional Court and its independence, among specialists and even in the debates during the Constituent Assembly, fears that such an institution could threaten the work and the authority of Parliament. The initial regulatory method of the Court was, "in the end, a compromise which finally also had direct consequences on the powers of the Court and on the effects of its decisions". This includes, in particular, the solution on the possibility that the objections of unconstitutionality pronounced by the Court within *a priori* review be rejected by Parliament, by a 2/3 vote, a solution in relation to which judges of the Constitutional Court of Romania are "often questioned, on critical positions"[62], during international meetings, as he stated. In such a context, "the Court has the mission to prove in front of the Romanian political and civil society that the European model of constitutional jurisdiction can also prove its effectiveness" in Romania.

The Court achieved this during the period of reference by the following main ways, according to its president at the time of the report:

♦ the self-restraints of the constitutional jurisdiction; the Court has proved that it is neither a "substitute of the legislature", even if by force of things, its space of action is often placed in a "grey area", at the intersection of law and politics, nor a "substitute of the judge", as it does not interfere in the settlement of the cause, being a sovereign power of the judiciary;

♦ in public opinion, the Court has been seen as a court for citizens which they increasingly use when their freedoms are in danger, "from this point of view, the Court established an innovation, namely the affirmation of the direct applicability of constitutional rules. By various decisions, the Court aimed at the removal of any discriminations contained in the law and that may obstruct the guarantee of equal opportunities for expression and development for all people";

♦ the use of the practice of the European Court of Human Rights and the success in the sense that "many courts began to take over the actions of the Constitutional Court";

♦ the permanent encouragement that, in the exercise of powers, public authorities pay more respect to themselves, and all fulfill their powers in full consideration for the fundamental rights of citizens, "ultimately, even the Romanian revolution was constitutional, like those in other East and Central European countries, and people, revolting against the closed and totalitarian society, and adopting the new Constitution, wanted to have their own constitutional state and a democratic governance based on the law and on

[61] N. Popa, *Opening speech*, in "The Constitutional Bulletin" no. 5/2003, pp. 1-2, available at *www.ccr.ro*.

[62] This legislative solution has been enshrined before only in two European states – Portugal and Poland –, but being removed at the moment.

the prevalence of law on violence and anarchy. Nobody has the right to forget this or to try to deprive the constitutional principles and rules of their substance".

The attendance and the speeches on the occasion of this celebration of the Constitutional Court[63] are likely to underline, however, another dimension of the development of the Constitutional Court, namely the establishment and strengthening of relations with other constitutional courts and relevant international bodies. Thus, in 1994 the Constitutional Court of Romania became a member of the Conference of European Constitutional Courts, thus developing relationships with all Member Courts[64]. In 1998[65], the Constitutional Court of Romania became a member of the Association of Constitutional Courts using the French language (ACCPUF)[66].

Finally, we consider as particularly important, in the same period, the creation of a review of the constitutional court, The Constitutional Court Bulletin. Mihai Lucian, former president of the Constitutional Court, came ahead this action, in the first issue of the Bulletin, in 1999, as follows: "the existence of an exaggerated «reticence» of the Constitutional Court should be accepted, fact that the Court itself is guilty of. It is the duty of the Constitutional Court to make its existence and activity known not for the sake of publicity. As «The goal of the Constitutional Court is to guarantee the supremacy of the Constitution» (according to Article 1 para. (3) of Law no. 47/1992 on the organization and operation of the Constitutional Court), the Court should impose itself in the consciousness of every citizen who should not only know that there is a Constitution, but also that there is an authority that intervenes, upon request (even submitted by any citizen, provided he or she has observed the legal ways) and which can impose the application of the Constitution to everybody (including – primarily – the Parliament!) as a fundamental ground for the operation of the rule of law. That is why the periodical publishing of «The Constitutional Court Bulletin» represents a necessity within a larger strategy of disseminating the information regarding the existence and the activity of this public authority. The articles, the commentaries, the information, which this periodical publication intends to bring to the attention of the experts but also to the civil society often contain the presentation of some opinions of the Constitutional Court members, as well as of its other experts, referring to: matters of broad interest in the field of constitutional jurisdiction, in the country and abroad; the contents of certain most important decisions of the Constitutional Court, especially those regarding the protection of the fundamental human rights and freedoms;

[63] "The Constitutional Court Bulletin" no. 5/2003, available at *www.ccr.ro*.

[64] The Conference of the European Constitutional Courts established in 1972, brings together 40 constitutional courts and similar European bodies, with competence in the constitutional justice; the presentations and the Regulation of the Conference of the European Constitutional Courts are available on the website *http://www.confeuconstco.org*.

[65] See Law no. 59 of 5 March 1998 on the application of the Constitutional Courts of Romania for the Association of the Constitutional Courts using the French Language (ACCPUF), published in the Official Gazette of Romania, Part I, no. 111 of 11 March 1998.

[66] Established in 1997 in order to strengthen the relations between the members of the francophone community, and it brings together constitutional courts and similar bodies in Africa, Europe, America and Asia; the presentation of the is available on the website *www.accpuf.org*.

the events organised by the Constitutional Court or which are attended by its representatives. We hope that we shall contribute in this way to a better knowledge of the Constitutional provisions and of the mechanism of the rule of law". In 2004, the Constitutional Court Bulletin ceased its publication. In 2009, at the initiative of the judge Tudorel Toader, who also became editor, the Constitutional Court Bulletin started again its half-yearly publication and the first issue was financially sponsored by Universul Juridic Publishing House in Bucharest. Currently the Constitutional Court Bulletin is published in Romanian, French and English and it is distributed to public bodies and authorities in the country, as well as to the constitutional courts which are dialogue partners. As demonstrated even by the studies cited in this article, the objectives stated at the establishment of the Constitutional Court Bulletin have been achieved and the journal became a space where the judges and the magistrates-assistant of this Court can express themselves, with effects even in terms of constitutional and legal amendments concerning the activity of the Constitutional Court.

2. The period 2003 and present

2.1. Constitutional regulation. The powers and the effects of the decisions of the Constitutional Court

The use of the experiences, of the doctrinal commentaries, of the criticism made, the law for the revision of the Constitution of 2003 brought a considerable consolidation to the Constitutional Court, even if we refer only to the removal of the two fundamental vulnerabilities aiming essentially at the relation between the Constitutional Court and Parliament or the effects of the Constitutional Court decisions. However, the amendments have been much more extensive and a remarkable synthesis of them was made by Constantin Doldur, in a study published in the Bulletin of this Court, shortly after revision[67]. This study underlined that "taking on practically all the experiences gathered in almost twelve years of application of the Basic Law, the criticism made in the literature, as well as the evolutions in the area on constitutional justice in Europe, the Law for the revision of the Constitution brought substantial amendments and supplements to those six articles under Title V of the Constitution containing regulations on the review exercised by the Constitutional Court", and that "the Constitutional Court decisions have even anticipated some of the amendments and supplements to the Constitution by the revision Law". Thus:

♦ "Constitutional regulations on the review of constitutionality introduced pursuant to the revision of the Basic Law underline the role assigned to the court of constitutional jurisdiction, articulated in the phrase: «*The Constitutional Court is the guarantor for the supremacy of the Constitution*», falling under current Article 142 which opens Title V of the Constitution, as revised and republished. [...] The constitutional Act had been wanting for a text to specify the role of the Constitutional Court. This role, far from merely a formal

[67] C. Doldur, *Constitutional review..., cited paper*, pp. 11-14, available at *www.ccr.ro*.

statement, is strengthened by the new framing of competencies vested in the Constitutional Court, as well as by additional or more precise definitions made in regard to constitutional provisions regulating the effects of decisions rendered by the Court".

♦ "Now for the first time is the Constitutional Court vested with the power to adjudicate «on the constitutionality of treaties or other international agreements upon notification by one of the Presidents of the two Chambers, a number of at least fifty Deputies or at least twenty-five Senators». Closely connected with that prerogative of the Constitutional Court, [...] according to the new para. (3) of article 11 of the Constitution, «*If a treaty to which Romania is to become a party comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution*». The provision included therein has clarified the relation between international agreements and the national Constitution, in acknowledging supremacy to the latter. The constitutional review is ultimately designed either to deter ratification of the treaty or to determine the initiation of the procedure for the revision of the Constitution".

♦ "The Constitutional Court competence also embraces the resolution of «*legal disputes of a constitutional nature between public authorities, on the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the President of the Superior Council of Magistracy*». This new power confers an arbitror's role to the Court in disputes between constitutional bodies. [...]. It still remains to observe the legislature's mindfulness to avoid, to the extent possible, any implication by the Constitutional Court into the political area, through a double qualification of the nature of disputes to be adjudicated on. As the text specifies, the Constitutional Court is competent to settle only legal disputes of a constitutional nature. In this case, too – the Court acts upon notification by the subjects expressly enumerated by the Constitution, representing all three public powers. The introduction of the new prerogative entrusted to the Constitutional Court shall undoubtedly constitute a solid guarantee that the exercise of powers by public authorities shall be carried out while observing the principles of the rule of law, within strict boundaries set by the Constitution". We shall remind that one of the basic ideas of the case-law from the years before the revision was, as shown, the obligation of public authorities to pay more respect to themselves and to fulfill their powers in full consideration for the fundamental rights of citizens. The new power is an important tool in order to achieve this goal in accordance with the provisions of the Constitution and, therefore, the opportunity of the Constitutional Court to verify the observance of the Constitution by authorities and to impose it.

♦ "Other important amendments and supplements made to the Basic Law concern the sphere of subjects entitled to refer to the Constitutional Court with a view to initiating a constitutional review, to which has now added the Advocate of the People, who may refer to the Court on the subject of unconstitutionality of laws before promulgation and also with the exception of unconstitutionality, which he can raise directly. [...]. The new constitutional provisions have supplied the Advocate of the People with an efficient intervention mechanism enabling him to fulfill his tasks – the protection of the citizens' rights and fundamental freedoms".

♦ "Another important amendment concerns the possibility to bring up an objection of unconstitutionality not only before the ordinary courts of law, but also before of commercial arbitrage. That will obviously create the possibility of a more extensive constitutional review, in particular on commercial legislation, although we think it might also entail certain negative effects, in that it could result in lengthier duration of proceedings for the settlement of litigations, which may be considered as contravening the principle of speediness that characterises arbitration procedure and commercial law. These constitutional amendments are devised as a considerable enlargement of the ambit of concrete subsequent review, by way of an objection, on laws and Government ordinances in force, to be exercised by the Court. In this way, the Constitutional Court will be all the more capable of fulfilling its role to protect citizens, their rights and freedoms, in relation with the legislative power".

♦ "As regards the constitutionality review of international treaties, it is laid down that where a treaty or international agreement has been found constitutional such instrument cannot be the subject-matter of an objection of unconstitutionality. This provision ensures the safeguarding of international commitments undertaken by the State. For the situation where, pursuant to having exercised a constitutional review of treaties or international agreements, such were held unconstitutional, it is provided that these cannot be ratified, a solution which is correlated with provisions under Article 11 para. (3) of the Constitution, also recently introduced".

Concluding on the new prerogatives, Constantin Doldur expressed the view that "following the substantial amendments and supplements incorporated into the texts of the Constitution, the constitutional review, as an inseparable part of the rule of law, has seen itself strengthened and even more capable of affirmation as a basic principle of a constitutional democracy. In this context, the Constitutional Court is about to enter a new phrase in its existence, characterized by additional tasks but also by a special responsibility for its members".

♦ "Yet another important innovation brought by the Law for the revision of the Constitution consists in abandoning the rigid character of regulations concerning the powers of the Constitutional Court. According to the new regulations put in place, the enumeration of the Court prerogatives, under Article 147, ends with the stipulation that the Court shall also carry out other powers as may be provided by its organic law, which allows an easier accommodation of the Court of competence to new requirements as may be posed in the future".

♦ "As regards the effects of the Constitutional Court decisions, the Law for the revision has completely restructured the provisions of the former Article 145 of the Constitution. Now, the new provisions of Article 147 explicitly confer a general binding nature to all decisions of the Constitutional Court as of the date of publication in the Official Gazette of Romania. Moreover, it is ordained that Parliament and Government have an obligation to bring provisions held unconstitutional in line with those of the Constitutions. In case of a concrete subsequent review on laws and Government ordinances, as well as on Parliament Standing orders, Article 147 para. (1) stipulates that unconstitutional provisions shall cease their legal effects within 45 days of publication of the Constitutional Court decisions if, in the

meantime, the Parliament or, as the case may be, the Government have not brought unconstitutional provisions in line with those of the Constitution. For this limited length of time, provisions found to be unconstitutional shall be suspended de jure. In what concern the abstract «*a priori*» review, Article 147 para. (2) establishes an obligation for Parliament to reconsider provisions held unconstitutional in order to bring them into accord with the decisions of the Constitutional Court". As regards the same issue on the new constitutional regulation of the effects of the Constitutional Court decisions, Ioan Vida noted that "this unequivocal proclamation of the generally binding nature of the Court decisions has put an end to all possible controversy about the effects of decisions delivered in the upholding of objections of unconstitutionality by the authority of constitutional jurisdiction"[68]. He also underlined that "the binding nature of decisions of the Constitutional Court for the court 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"[69].

Therefore, it is noted the change itself of the vision on the role of the Constitutional Court, which is not only a pioneer and guardian of constitutional democracy. The constitutional review, improved and strengthened in 12 years of Constitutional Court enters into a new phase, together with the revision of the Constitution, as the main mechanism of constitutional changes/adjustments, and of the whole system of law, in accordance with "the changes occurred on the social plan", and on the national and international one. The new powers of the Constitutional Court, established during the revision and subsequently by the organic law, are one of the guarantees in order to achieve this role.

2.2. Infra-constitutional regulation. New powers and procedural rules

The revision of the Constitution also resulted in the amendment of the organic law of the Constitutional Court, achieved by Law no. 232/2004[70], followed by the republication[71] of Law no. 47/1992, as amended and supplemented and consequently the renumbering of the texts. In 2004, on the occasion of this amendment to the organic law of the Court, the Constitutional Court was conferred a new power, under Article 146 letter l), namely to adjudicate, *ex officio*, on the law for the revision of the Constitution, within five days of its adoption by Parliament.

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[68] I. Vida, *The obligatory force of decisions of the Constitutional Court for other courts as a stabilising factor of the Constitution*, in "The Constitutional Court Bulletin" no. 7/2004, pp. 15-18, available at *www.ccr.ro*.
[69] *Ibidem*.
[70] Published in the Official Gazette of Romania, Part I, no. 502 of 3 June 2004.
[71] Published in the Official Gazette of Romania, Part I, no. 643 of 16 July 2004.

In 2010, the organic law of the Court was amended again by Law no. 177/2010[72], when the Constitutional Court was conferred a new power, namely to adjudicate on the constitutionality of the resolutions of the plenum of Chamber of Deputies, of the plenum of the Senate and of the plenum of the joint Chambers of Parliament.

Another important amendment concerned the procedure for the settlement of the exceptions of unconstitutionality as a result of the finding that, in many instances, the parties invoked the exceptions of unconstitutionality, being way to delay the settlement of cases, whereas during the settlement of the exception of unconstitutionality by the constitutional court the judgment of the case where it was raised was suspended. To avoid these inconveniences, by Law no. 177/2010 amending Law no. 47/1992 on the organization and operation of the Constitutional Court, the Civil Procedure Code and the Criminal Procedure Code of Romania, rules on the suspension *ope legis* of cases where the exceptions of unconstitutionality are invoked were abrogated, namely the provisions of Article 29 para. (5) of Law no. 47/1992, Article 303 para. (6) of the Criminal Procedure Code and Article 8 para. (7) of the Law no. 85/2006 on the insolvency proceedings, which resulted in an important reduction in the number of files on exceptions of unconstitutionality. Adjudicating on this law, within *a priori* review, by Decision no. 1106/2010[73], the Court held that the intervention of the legislature which abrogates the measure to suspend the cases on the exceptions of unconstitutionality is the very expression for taking and observing the responsibility which the State has in order to create the legislative framework in compliance with the conventional provisions. The new regulation provides individual access to justice, both in the common court and in the constitutional court, and the parties continue to benefit from all means of defences which are recognized by law and therefore from the possibility to truly achieve his/her rights and to serve his/her interests before justice. The abrogation of the measure on the suspension as of right does not prejudice the right of access to court and it does not constitute an obstacle in the use of this right, likely to question the substance itself. Furthermore, the adopted measure ensures the procedural balance between people with opposing interests, which is meant to guarantee their equality of arms, by determining the legal framework for the exercise of their legitimate rights.

2.3. Case-law of the Constitutional Court. Main elements to strengthen the status of the Court and to develop the constitutional review

General considerations

The period after 2003, a period of time (until this study) exceeding by one year the period since the establishment of the Court and until the revision of the Constitution in 2003, is marked by the complex role of the Court, acquired by it at the same time with the revision of the Constitution on the one hand, the main instrument to ensure the change, and on the other hand, to ensure the stability of the Constitution.

[72] Published in the Official Gazette of Romania, Part I, no. 672 of 4 October 2010.
[73] Published in the Official Gazette of Romania, Part I, no. 672 of 4 October 2010.

Immediately after the revision, Ioan Vida noted 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"[74]. The new phase in which the Court entered assumed three main directions: **continuity, strengthening and development**, in relation to the inherent challenges in the socio-political and international developments.

Continuity and strengthening. Effects of decisions of the Constitutional Court

The current wording of the constitutional text caused a series of interpretations that puts into question the requirement of certain decisions of the Constitutional Court. Continuing its practice of explanation/clarification of these effects for a constitutional justice genuine and effective, the Court revived the recitals mentioned since 1995, enriched them in relation to the constitutional texts of reference, underlining the following statuaries, often repeated in the pronounced decisions:

♦ **All decisions of the Constitutional Court are generally binding, regardless of the pronounced solution**

In relation to the new constitutional framework and responding to criticism which claimed that the latter are not also binding, having distinguished between the decisions which ascertain the unconstitutionality or the constitutionality of a law, because such an interpretation would mean that the Court can never think over its own case-law as it is related to its previous findings, the Constitutional Court stated that the text of Article 147 para. (4) of the Constitution, which enshrines the general binding nature of its decisions, "does not distinguish based on the types of the decisions pronounced by the Constitutional Court, or on the content of those decisions, which results in the conclusion that all decisions of this Court, as a whole, are generally binding"[75]. Having shaded these statuaries in a case in which criticism of unconstitutionality concerned the very generally binding nature of the decisions of the Constitutional Court, interpreted by the authors of the exception of unconstitutionality as a limitation of the free access to justice, the Court held as follows: "the finding, by a decision of the Court, of the unconstitutionality of a legal text has *erga omnes* legal effects, a consequence deriving from the unique and independent character of the authority of constitutional jurisdiction. Contrary, the Court's decision – of rejection – is still generally binding and with effects only for the future, pursuant to Article 147 para. (4) of the Constitution, meaning that public authorities involved in the case in which the exception

[74] I. Vida, *The obligatory force..., cited paper*, pp. 15-18.
[75] Decision no. 2 of 11 January 2012, published in the Official Gazette of Romania, Part I, no. 131 of 23 February 2012.

was raised are bound by the decision, both in terms of the operative part and in terms of considerations that underpinned it, but the legal effect of such a decision falls within the procedural framework of the dispute only where the exception was raised, so it has *inter partes* nature. Therefore, the same legal text can be brought again for review before the Constitutional Court, considering that new aspects and constitutional grounds may be revealed and that those can justify, in the future, a different solution"[76].

♦ The recitals of the Constitutional Court decisions supporting the solution set out in the operative part are alike generally binding

In an established case-law (one of the elements of continuity to which we refer), starting with the Decision of the Plenum no. 1/1995[77], the Court held that res judicata which accompanies the jurisdictional acts, and therefore the Constitutional Court's decisions, is attached not only to the operative part, but also to the recitals on which it is based. Accordingly – the Court has noted – both Parliament and the Government, respectively public authorities and bodies shall fully comply with both the recitals and the operative part of the decisions pronounced by the Constitutional Court. This particular effect of acts of the Constitutional Court is a consequence of its role, which could not be fully achieved if it would not be accepted the binding nature of the interpretation given by the Court to the texts and the concepts of the Basic Law, the meaning identified by it to the framer's will. It has been indicated[78] that this process used by the Court is meant to remind public authorities involved in the lawmaking process the issue of effectiveness of constitutional justice[79], in the context of a manifest legislative instability, with profoundly negative effects on the values of the rule of law and legal certainty. As concerns the phrase "res judicata" referred to by the Constitutional Court, attaching it both to the recitals and to the operative part of decisions pronounced by it, is the expression of *erga omnes* binding of the interpretation given by the Court to the Constitution. Such binding is based on the constitutional provisions of Article 1 para. (3) and (5), of Article 142 para. (1) and of Article 147 para. (4)[80]. Therefore, it is neither res judicata as a concept of the civil proceedings supplementing the proceedings before the Constitutional Court, nor an "autonomous"

[76] Decision no. 302 of 27 March 2012, published in the Official Gazette of Romania, Part I, no. 361 of 29 May 2012.
[77] Published in the Official Gazette of Romania, Part I, no. 16 of 26 January 1995.
[78] M. Safta, K. Benke, *The obligatory force of recitals in the decision of the Constitutional Court*, in "Dreptul" no. 9/2010, pp. 28-55.
[79] We mentions that the constitutional court has also invoked the res judicata attached to the recitals of the decisions of the Constitutional Court, in other decisions, for example, Decision no. 196/2013, published in the Official Gazette of Romania, Part I, no. 231 of 22 April 2013; Decision no. 163/2013, published in the Official Gazette of Romania, Part I, no. 190 of 4 April 2013; Decision no. 102/2013, published in the Official Gazette of Romania, Part I, no. 208 of 12 April 2013; Decision no. 1039/2012, published in the Official Gazette of Romania, Part I, no. 61 of 29 January 2013; Decision no. 536/2011, published in the Official Gazette of Romania, Part I, no. 482 of 7 July 2011; Decision no. 414/2010, published in the Official Gazette of Romania, Part I, no. 291 of 4 May 2010; Decision no. 415/2010, published in the Official Gazette of Romania, Part I, no. 294 of 5 May 2010.
[80] M. Safta, K. Benke, *cited paper*, p. 41.

concept[81], but the expression of the particular effect of the decisions of the Constitutional Court. Thus, in order to avoid any misunderstanding, the recent case-law of the Constitutional Court has ceased to refer to the phrase "res judicata".

Continuity and development. Former powers – reinterpretation of competence

♦ Constitutional review of laws and abrogated ordinances

In order to ensure an effective access to constitutional justice, the Constitutional Court of Romania proceeded to reinterpret the provisions of the law on its organization and operation, provisions that limited the scope of acts that could be subject to the Court's review through the exception of unconstitutionality, only for those laws and ordinances *in force* at the time of the exercise of the constitutional review.

Thus, by Decision no. 766 of 15 June 2011[82], the Court found that the phrase "in force" laid down in the provisions of Article 29 para. (1) and of Article 31 para. (1) of Law no. 47/1992 on the Organization and Operation of the Constitutional Court is constitutional insofar as it is interpreted as submitting to the Constitutionality review the laws or ordinances or provisions therein, whose legal effects continue to produce even when they are no longer in force. The Court held that within the Romanian system of concrete review of the constitutionality of laws, the initiation of the *a posteriori* review is only indirect, through the exception of unconstitutionality raised before the courts of law or commercial arbitration, and not through an "*actio popularis*", based on the direct application by any person. The establishment of this review procedure for the constitutionality of the law applicable in the case submitted for the settlement before the court of first instance, as a means of access to the courts, necessarily involves ensuring the possibility to be used by all those having a right, a legitimate interest and standing. The condition according to which the legal provision challenged for unconstitutionality should be related to the settlement of the case is, obviously, necessary, but also sufficient. However, adding a supplementary condition – that the legal provision should also be formally in force –, whose failure has the drastic significance of a real dismissal of the referral addressed to the constitutional court concerning the respective exception of unconstitutionality, represents a restriction of the free access to the constitutional court. All the more so as the repeal or the formal lapsing of a legal standard does not necessarily suppose its inapplicability in all situations. Even if law is alive and, at the same pace as society, it must adapt to changes, no less normative solutions that they enshrine must comply with the principles of the Basic Law. Once referred to, the Constitutional Court must examine them, without rendering this review conditional upon the removal, under any form, from the active fund of the legislation, of the act challenged for unconstitutionality.

[81] I. Deleanu, S. Deleanu, *Case-law and the jurisprudential upturn*, Universul Juridic Publishing House, Bucharest, 2013, p. 71.

[82] Published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011.

The recitals noted by the doctrine[83] for the reconsideration of the case-law of the Constitutional Court are the following: the case-law of the European constitutional courts, the introduction of the condition of reasonableness upon the legal restriction on free access to constitutional court, the necessity and sufficiency of the condition of admissibility of the exception of unconstitutionality regarding the connection with the case. Moreover, even the Court refers to the landmarks held in this matter, within the recitals of the pronounced decisions, namely the constitutional courts in Germany, Italy, Hungary, the Czech Republic, Poland, and France.

We believe that it is about continuity and development, as the idea of such review had been expressed within the Court previously to the revision, in a separate opinion signed by its former president, Lucian Mihai[84]. Then, a step in this regard was accomplished with the case-law by which the Court held that the unconstitutionality of an emergency ordinance affects the normative act in its whole, and therefore the repealing of certain provisions laid down in the challenged normative act, after the referral of the constitutional court, has no longer any relevance in the settlement of the exception of unconstitutionality[85]. Finally, the Constitutional Court intervened extensively by Decision no. 838 of 27 May 2009 on the referral formulated by the President, the existence of a legal dispute of a constitutional nature between the judicial authority, represented by the High Court of Cassation and Justice, on the one hand, and the Parliament of Romania and the Government of Romania, on the other hand[86], when the Court held that "the only authority authorized to exercise the constitutional review of laws and ordinances is the constitutional court. Therefore, neither the High Court of Cassation and Justice nor the courts of law or other public authorities of the State have not the power to review the constitutionality of laws or ordinances, regardless if the same are in force or not"[87]. Therefore, "accumulations" in the development of the constitutional review practically led to a reconsideration of the Constitutional Court's competence in the exercise of the power in the settlement of the exceptions of unconstitutionality.

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[83] G. Gîrleşteanu, *The partial reconsideration of the case-law of the Constitutional Court of Romania on the a posterior constitutional review of laws and ordinances in force – theoretical and practical considerations on Decision no. 766 of 15 June 2011*, in "Pandectele române" no. 8/2011, pp. 173-188.

[84] Separate opinion to Decision no. 102 of 10 April 2001, Published in the Official Gazette of Romania, Part I, no. 655 of 18 October 2001.

[85] Decision no. 1221 of 12 November 2008, published in the Official Gazette of Romania, Part I, no. 804 of 02 December 2008; Decision no. 842 of 2 June 2009, published in the Official Gazette of Romania, Part I, no. 464 of 6 July 2009; Decision no. 984 of 30 June 2009, published in the Official Gazette of Romania, Part I, no. 542 of 4 August 2009.

[86] Published in the Official Gazette of Romania, Part I, no. 461 of 3 July 2009.

[87] Position defined in relation to that expressed by the High Court of Cassation and Justice, so as the constitutional courts can adjudicate on the constitutionality of the repealed provisions, under the principle of unlimited jurisdiction in the cases which were given for their settlement.

♦ Constitutional review of normative acts as interpreted by appeals in the interest of the law

We refer to decisions pronounced especially after 2011, with the development and refinement of the case-law of the Constitutional Court, respectively of the dialogue with the High Court of Cassation and Justice. Thus, if the exceptions of unconstitutionality on the decisions pronounced by the High Court of Cassation and Justice in joined divisions or decisions of other courts have been consistently rejected as inadmissible[88], the Court vested itself and examined on the merits the exceptions of unconstitutionality having as object the legal provisions as interpreted by the High Court of Cassation and Justice in the settlement of an appeal in the interest of the law[89].

Having mentioned and developed this distinction, the Court held that "the challenge of the provisions of a decision pronounced in an appeal in the interest of the law cannot be the object of the exception of unconstitutionality as it is, from this perspective, inadmissible because the constitutional court, in accordance with Article 146 of the Basic Law, has no power to censor the constitutionality of judgments, whether delivered in order to clarify certain causes of common law or in order to uniformly interpret and apply the law. Therefore, the High Court of Cassation and Justice, in accordance with the constitutional provisions of Article 126 para. (3), has the exclusive power to adjudicate on matters covering the uniform interpretation and application of the law whenever the legal practice requires. Thus, a decision pronounced in such proceedings cannot be *eo ipso* the object of censorship of the constitutional court (...). However, the fact that a certain interpretation is given to a legal text by a decision pronounced in an appeal in the interest of the law is not likely to be converted into a fine of inadmissibility so as the Court shall not analyze the text concerned as interpreted by the Supreme Court, despite its role of guarantor for the supremacy of the Constitution (...). With respect to the provisions of the Constitution, the Constitutional Court reviews the constitutionality of applicable legal texts in the interpretation enshrined by the appeals in the interest of the law. The upholding of a contrary view is contrary to the very reason of the existence of the Constitutional Court, which would deny its constitutional role if it accepted that a legal text could be applied within the limits that could interfere with the Basic Law"[90].

Having removed any confusion that might justify the claim that in this way the Constitutional Court would act *ultra vires*, Ioan Deleanu, former judge of this Court, underlined that we must always distinguish between the interpreted «legal text» and its «interpretation» given by the Supreme Court: thus, on its interpretation, such legal text is not removed from constitutional review, but he interpretation itself cannot be subject to this control because, obviously, the interpretation, whatever form it takes, is not completed

[88] Decision no. 409 of 4 November 2003, published in the Official Gazette of Romania, Part I, no. 848 of 27 November 2003.
[89] Decisions no. 202 of 18 April 2013 and no. 212 of 29 April 2013, published in the Official Gazette of Romania, Part I, no. 365 of 19 June 2013 and respectively in the Official Gazette of Romania, Part I, no. 371 of 21 June 2013.
[90] Decision no. 854 of 23 June 2011, published in the Official Gazette of Romania, Part I, no. 672 of 21 September 2011.

by the adoption of a general legal provision. The interpretation of the rules does not mean the adoption of a general legal rule. Constitutional review is conducted when a certain legal text has been given a meaning contrary to certain provisions in the Constitution[91].

♦ Jurisprudential upturns. The implementation of a new and evolutionary vision on the interpretation of constitutional provisions

The examination of the case-law of the Constitutional Court, both before and after 2003, also reveals the jurisprudential upturns. In many cases they were based on the use of the case-law of the European Court of Human Rights and, after the accession of Romania to the European Union, also on the case-law of the European Court of Justice[92]. The novelty, which can be noted since 2003, is the invocation of the doctrine of the "living law"[93], directly in the recitals of the decisions, which means practically that the Constitutional Court has extensively taken on its role on the evolutionary interpretation of the constitutional concepts, notably on human rights and fundamental freedoms.

Thus, in an established case-law, the Court underlined that the law is alive (Decision no. 766 of 15 June 2011[94] and Decision no. 356 of 25 June 2014[95]), and fundamental rights have no abstract existence (Decision no. 1533 of 28 November 2011[96]) given that constitutional concepts themselves, in turn, are subject to an evolutionary interpretative vision (Decision no. 498 of 10 May 2012[97] or Decision no. 1 of 10 January 2014, para. 171[98]). Thus, the Court is the sole public authority that has the power to give a binding interpretation to the text of the Constitution[99].

Development. Current powers – conceptual clarifications and self-restraint

♦ The settlement of legal disputes of a constitutional nature

This new power of the Constitutional Court, enshrined during the revision in 2003, has probably resulted in the most intense publicity and most often brought the Constitutional Court to public attention. Given the nature of the subject who may refer to the Court and the scope of issues liable to be the object of a conflict, often on the edge between politics and law, the Constitutional Court has had the rather difficult task to make clarifications and self-restraints, in the spirit of the constitutional rules governing its status and role, in order

[91] I. Deleanu, *The dialogue between the constitutional and the ordinary judge*, in "Pandectele române" no. 12/2013, pp. 19-39.
[92] Further, see T. Toader, M. Safta, *Changes in the constitutional case law*, available at *www.ssrn.com*.
[93] See I.A. Motoc, separate opinion to Decision no. 1106 of 2 September 2010, published in the Official Gazette of Romania, Part I, no. 672 of 4 October 2010.
[94] Published in the Official Gazette of Romania, Part I, no. 549 of 3 August 2011.
[95] Published in the Official Gazette of Romania, Part I, no. 691 of 22 September 2014.
[96] Published in the Official Gazette of Romania, Part I, no. 905 of 20 December 2011.
[97] Published in the Official Gazette of Romania, Part I, no. 428 of 28 June 2012.
[98] Published in the Official Gazette of Romania, Part I, no. 123 of 19 February 2014.
[99] Further, see Decision no. 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015.

to "definitely avoid the involvement of the Constitutional Court in any possible political disputes between public authorities"[100].

The constitutional text stated that only **legal disputes** (*per a contrario* and not the exclusively political ones) may be subject to such control. In addition, only disputes **of a constitutional nature** and not any type of disputes can be settled by the Court. By Decision no. 53/2005[101], the Constitutional Court ruled that a legal dispute of a constitutional nature between public authorities "includes acts or real actions by which one or more authorities take on powers, attributions and competencies which, under the Constitution, belong to other public authorities, or the omission of certain public authorities consisting in the contestation of the jurisdiction or in the refusal to perform certain acts that fall within their obligations. […]" The Court found that "the opinions, the valuable judgments or the assertions of the holder of a term of office for the public office, relating to other public authorities, are not legal disputes between public authorities, by themselves. The opinions and proposals, even critical, on how a certain public authority or structure acts or should act do not result in institutional blockages if they are not followed by actions or inactions susceptible to prevent the achievement of the constitutional powers of those public authorities. Such opinions or proposals remain within the limits to freely express political opinions, with the restrictions provided for by Article 30 para. (6) and (7) of the Constitution". By Decision no. 97/2008[102], the Court held: "a legal dispute of a constitutional nature occurs between two or more authorities and aims either at the content or the scope of their attributions arising from the Constitution, which means that they are disputes of competence, either positive or negative, and may create institutional blockages". By decision no. 270/2008[103], the Court rules that Article 146 letter e) of the Constitution "establishes the competence of the Court in the settlement of any legal dispute of a constitutional nature occurred between public authorities and not only disputes of competence occurred between them". They are constitutional landmarks which currently establish the competence of the Constitutional Court in the settlement of legal disputes of a constitutional nature occurred between public authorities.

♦ The review of the resolutions of the plenum of the Chamber of Deputies, of the plenum of the Senate and of the plenum of the joint Chambers of Parliament. Self-restraint

This new power of the Constitutional Court, enshrined in Law no. 177/2010, was the subject of fierce controversies. Among other things, it was claimed that this change "decreases the role of a constitutional tribunal at a too low level, on the scale of value", and that "the acceptance of the Court's review on certain parliamentary resolutions of a normative nature means to accept that it may decide, instead of Parliament, on certain appointments for terms of office and for public offices, so that Parliament could be

[100] I. Deleanu, *Institutions and constitutional procedures in the Romanian and comparative law*, C.H. Beck Publishing House, Bucharest, 2006, p. 865.
[101] Published in the Official Gazette of Romania no. 144 of 17 February 2005.
[102] Published in the Official Gazette of Romania no. 169 of 5 March 2008.
[103] Published in the Official Gazette of Romania no. 290 of 15 April 2008.

substituted", concluding that "this change (supplement) should be regarded as a serious political and parliamentary error"[104]. The position expressed by the Constitutional Court in this regard was that granting its power to exercise such constitutional review represents a diversification and strengthening of the competence of the Constitutional Court, the sole authority of constitutional jurisdiction in Romania, and a gain in the efforts to achieve a democratic State governed by the rule of law[105]. But, further, the Court has the task to prove whether and to what extent this new power represents a means to ensure the supremacy of the Constitution, namely to achieve its constitutional role.

To avoid any interpretations relating to the possible interference with the exclusive competence of Parliament, the Constitutional Court proceeded to thoroughly present its competence in carrying out the above-mentioned power. Thus, even if the legal text enshrining this power [by applying Article 146 letter l) of the Constitution] does not create a differentiation, the Court has established the following rules for the admissibility of referrals concerning the constitutional review of such resolutions of Parliament (other than the Regulations of Parliament and irrespective of their normative or individual nature[106]):

• the concerned resolutions shall be adopted after the Court was endowed with this new power[107];

• the concerned resolutions shall affect the value, rules and constitutional principles or, as the case may be, the organisation and operation of authorities and bodies of constitutional level[108];

• the norm of reference should be of constitutional level, so the Court can analyze whether there is any contradiction between the resolutions mentioned in Article 27 of Law no. 47/1992, on the one hand, and the procedural and substantive requirements established by the provisions of the Constitution, on the other hand. Therefore, the challenges must have a clear constitutional relevance, not a legal or regular one. Consequently, all resolutions of the plenum of the Chamber of Deputies, of the plenum of

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[104] I. Muraru, A. Muraru, *A century of constitutional review in Romania*, in the Romanian Review of Public Law no. 2/2012, pp. 171-186.

[105] Decision no. 727 of 9 July 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012.

[106] "The text of Article 27 of Law no. 47/1992 does not create any differentiation between the resolutions that be subject to review carried out by the Constitutional Court in terms of the area in which they were adopted or in terms of the normative or individual nature, which means that all these resolutions are likely to be subject to constitutional review – *ubi les non distinguit nec nos distingere debemus*. Consequently, the referrals of unconstitutionality concerning such resolutions are *de plano* admissible" (Decision no. 307 of 28 March 2012, published in the Official Gazette of Romania, Part I, no. 293 of 4 May 2012).

[107] Decision no. 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2011; Decision no. 54 of 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2011; Decision no. 307 of 28 March 2012, published in the Official Gazette of Romania, Part I, no. 293 of 4 May 2012; Decision no. 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012.

[108] Decision no. 53 of 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2011; Decision no. 54 of 25 January 2011, published in the Official Gazette of Romania, Part I, no. 90 of 3 February 2011; Decision no. 307 of 28 March 2012, published in the Official Gazette of Romania, Part I, no. 293 of 4 May 2012; Decision no. 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012.

the Senate and of the plenum of the two joint Chambers of Parliament may be subject to constitutional review, whether provisions of the Constitution are invoked in support of the challenge of unconstitutionality. These provisions shall be effectively invoked rather than formally[109];

• as concerns the resolutions which, by their object, aim at the organizations and operation of authorities and bodies of constitutional level, the norm of reference, within the exercise of the constitutional review, can be both a provision of constitutional and of infra-constitutional level, taking into account the provisions of Article 1 para. (5) of the Constitution. The area of utmost importance where these resolutions occur gives the Court such guidance – authorities and bodies of constitutional level – so as the constitutional protection conferred upon fundamental authorities or bodies of the State must be one accordingly. Consequently, the resolutions of the plenum of the Chamber of Deputies, of the plenum of the Senate and of the plenum of the two joint Chambers of Parliament aiming at the organization and operation of authorities and bodies of constitutional level may be subject to constitutional review, even if the infringed alleged normative act has an infra-constitutional value. The Court also noted that "the acceptance of the contrary, with the consequent of the exclusion from the exercise of constitutional review of the Resolutions of Parliament of Romania given in breach of the express provisions of the law, would result in placing the supreme representative body of the Romanian people – Parliament –, above the law, and in the acceptance of the idea that precisely the constitutional authority to adopt laws can violate them without being sanctioned in any way. Or, in a rule of law, no one is above the law"[110].

Novelty and adaptation. The acceptance of EU law and the case-law of the European Court of Justice[111]

The accession of Romania to the European Union represented a major challenge for the constitutional review in Romania, as in other countries which followed the same process. Following the references of the Constitutional Court's adaptation and of the identification of a "way" relating to EU law and creating a dialogue with the European Court of Justice, the main phases can be summarized as follows:

♦ basic statuaries on the relations between national and Community law, as well as on the obligations of the public authorities in relation to the accession to the European Union in the period prior to accession; a speech favourable to accession/integration

Such basic statuaries started with Decision no. 148/2003 on the constitutionality of the proposal for the revision of the Romanian Constitution[112], through which the Court ruled on

[109] Decision no. 307 of 28 March 2012, published in the Official Gazette of Romania, Part I, no. 293 of 4 May 2012; Decision no. 783 of 26 September 2012, published in the Official Gazette of Romania, Part I, no. 684 of 3 October 2012.

[110] Decision no. 251 of 30 April 2014, published in the Official Gazette of Romania, Part I, no. 376 of 21 May 2014.

[111] Further, see T. Toader, M. Safta, *The Dialogue between the Constitutional Court of Romania and the European Court of Human Rights*, in "Dreptul" no. 9/2013, pp. 93-124, available at *http://web.ebscohost.com*.

[112] Published in the Official Gazette of Romania, Part I, no. 317 of 12 May 2003.

for the purpose that the provisions on the accession to Euro-Atlantic structures without the infringement of the limits of the revisions, by reference to the concepts of sovereignty and independence. It is important to mention that, with the enshrining of the rule on the priority enforcement of Community law in relation to the opposite provisions in the national laws established by the proposal for the revision of the Constitution, the Court noted that "*Member States of the European Union agreed to place the Community acquis – Treaties establishing the European Union and the regulations derived from them – on an intermediate position between the Constitution and the other laws when it comes to binding European laws*"[113]. The Court implicitly understood the same hierarchy of rules, without developing on that occasion the issue of the relations between European law and the Constitution. Moreover, such development was not required in the context, but it continued after the revision, being also an element of continuity and development. Such coordinates, as outlined, underline the further jurisprudential development, in comparison with that of other European constitutional courts during the analyzed period (Poland, Czechs, Lithuania, Estonia, Latvia), being able to identify, as a general characteristic, a speech favorable to EU integration, focused on the idea of judicial harmonization[114].

♦ **underlining the need for the harmonization of the national legislation with the European one; the use of certain interpretative instruments aiming at the guarantee of the consistency of the harmonization process; the case-law of the European Court of Justice**

In many decisions pronounced after 2007, the Constitutional Court found that the main or delegate legislature accomplished the harmonization of the national legislation with the European provisions in various areas[115]. In some cases, the recitals of the pronounced decisions include the development of argumentation as to underline the obligation and the importance of the harmonization process, justifying the adoption of certain laws[116]. In the period after accession, it is found that the Constitutional Court of Romania increasingly invoked the case-law of the ECJ[117], an approach which was also common to other

[113] *Ibidem*.

[114] A. Albi, *Eu Enlargement and the Constitutions of the Central and Eastern Europe*, Cambridge University Press, 2005, p. 52, see also Decision no. 298 of 29 March 2006, published in the Official Gazette of Romania, Part I, no. 372 of 28 April 2006.

[115] Decision no. 1033 of 9 October 2008, published in the Official Gazette of Romania, Part I, no. 757 of 10 November 2008; Decision no. 631 of 12 May 2011, published in the Official Gazette of Romania, Part I, no. 536 of 29 July 2011; Decision no. 432 of 15 April 2010, published in the Official Gazette of Romania, Part I, no. 361 of 2 June 2010; Decision no. 666 of 17 May 2011, published in the Official Gazette of Romania, Part I, no. 502 of 14 July 2011; Decision no. 688 of 31 May 2011, published in the Official Gazette of Romania, Part I, no. 537 of 29 July 2011; Decision no. 1289 of 4 October 2011, published in the Official Gazette of Romania, Part I, no. 830 of 23 November 2011; Decision no. 447 of 7 April 2011, published in the Official Gazette of Romania, Part I, no. 485 of 8 July 2011; Decision no. 1591 of 13 December 2011, published in the Official Gazette of Romania, Part I, no. 80 of 1 February 2012.

[116] Decision no. 802 of 19 May 2009, published in the Official Gazette of Romania, Part I, no. 428 of 23 June 2009; Decision no. 1070 of 8 September 2009, published in the Official Gazette of Romania, Part I, no. 703 of 20 October 2009.

[117] Decision no. 1344 of 13 October 2011, published in the Official Gazette of Romania, Part I, no. 32 of 16 January 2012; Decision no. 1237 of 6 October 2010, published in the Official Gazette of Romania, Part I, no. 785 of 24 November 2010.

Constitutional Courts before accession[118], in order to guide the action of the legislature, to explain or found its approach. We refer to what the doctrine called "interpretative tools", being at the disposal of the Constitutional Courts and used in order to establish the compliance with a consistent and coherent interpretation of national legislation with EU law[119].

♦ delimitation of powers; Constitutional loyalty in the interpretation and application of European Union law

After a short period of differentiated case-law[120], the Constitutional Court of Romania decided on the issue regarding the relations of competence among national courts, constitutional courts and the ECJ, in the matter of priority interpretation and application of EU law, implicitly ruling on the obligations of national courts in this context.

Thus, in an established case-law, the Constitutional Court noted[121] that it does not have the power "*to examine whether a provision of national law complies with the text of the Treaty establishing the European Community (now the Treaty on the Functioning of the European Union) in terms of Article 148 of the Constitution. Such power, namely to establish whether there is a contrariety between national law and the EC Treaty, belongs to the court of law, which, in order to reach a fair and lawful conclusion, ex officio or upon request of the party, may submit a preliminary question in the meaning of Article 234*[122] *of the Treaty establishing the European Community before the Court of Justice of the European Communities. If the Constitutional Court would be deemed competent to adjudicate on the conformity of national legislation with the European legislation, we would face a possible legal dispute between the two courts, which, at this level, is unacceptable*". Similarly, the Court also held that[123] "*the attribution of priority application of the binding Community rules binding in relation to the provisions of the national legislation belongs to the court of law. It is a matter of the enforcement of law, not of constitutionality*"[124], and that "*within the relations between the Community and the national law (except the Constitution), we can only refer to priority application of the former in relation to the latter and such matter falls within the competence of the courts*". Thus, the constitutional

118 D. Piqani, *Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration, EJLS,* vol. I, nr. 2, available at *http://www.ejls.eu/2/28 UK.pdf*..

119 *Ibidem*, p. 8.

120 Decision no. 59 of 17 January 2007, published in the Official Gazette of Romania, Part I, no. 98 of 8 February 2007; Decision no. 558/2007 published in the Official Gazette of Romania, Part I, no. 464 of 10 July 2007; Decision no. 1031/2007, published in the Official Gazette of Romania, Part I, no. 10 of 7 January 2008.

121 Decision no. 1596 of 26 November 2009, published in the Official Gazette of Romania, Part I, no. 37 of 18 January 2010 or Decision no. 1289 of 4 October 2011, published in the Official Gazette of Romania, Part I, no. 830 of 23 November 2011.

122 Article 267 TFUE.

123 Decision no. 137 of 25 February 2010, published in the Official Gazette of Romania, Part I, no. 182 of 22 March 2010.

124 In the same respect, for example, the Constitutional Court of Austria, see for developments G. Kucsko-Stadlmayer, *Constitutional review in Austria – Traditions and New Developments*, communication presented at the International Conference on the 20th anniversary of the Constitutional Court of Romania, available on the website of the Constitutional Court of Romania – *www.ccr.ro*.

review[125] is a review of internal rules in compliance with the Constitution. If national rules transpose a European rule, it may be needed to raise a preliminary question before the ECJ and the reporting to the interpretation given by it in order to conduct the constitutional review.

Having developed the above-mentioned recitals in a series of decisions – by which constitutional review was exercised on a certain regulation on which the ECJ had formulated an answer to a preliminary question raised by a Romanian court – the Court ruled on the relations of power among the ECJ, national courts and the Constitutional Court, referring to the mechanism of preliminary questions[126]. By the same decisions, the Court, stating that "*it is neither positive legislature nor a court with jurisdiction to interpret and apply EU law in disputes involving subjective right of citizens*", allows that it can use a rule of European law within the constitutional review as a rule interposed to that of reference, subject to meeting certain conditions: "*this rule must be sufficiently clear, precise and unambiguous in itself or its meaning must have been clearly, precisely and unequivocally established by the European Court of Justice [...], the rule must be circumscribed to a certain level of constitutional relevance, so that its legal content might support the possible infringement by the national law of the Constitution – the only direct reference standard in its constitutional review. In such a case the approach of the Constitutional Court is distinct from the simple application and interpretation of law, jurisdiction belonging to courts and administrative authorities, or from any issues of legislative policy promoted by Parliament or the Government, as appropriate*". Court explicitly stated that "*in the light of cumulative set of conditionality, it is up to the Constitutional Court to apply or not in its constitutional review the judgments of the European Court of Justice or to formulate itself of preliminary questions to establish the content of the European rule*". By the above-mentioned decisions, it is found that the constitutional judge of Romania promotes a pluralistic conception and mutual respect between the courts belonging to legal orders which are parties in a proceeding of interference[127].

♦ supremacy of the Constitution, national Constitutional Identity

Continuing those ruled since 2003 with the constitutional review of the initiative for the revision of the Constitution, the Constitutional Court reasserted the principle of supremacy of the Constitution over all national legal orders when it ruled on adjudicated on another initiative for the revisions of the Basic Law in 2014. The Court held on that occasion that by establishing that the European Union law applies without any circumstantiation within the national legal order, that fact of making no distinction between the Constitution and the other domestic laws equals to placing the Basic Law in the background compared to the

[125] Power provided for in Article 146 letter b) of the Constitution has a special status.
[126] Decision no. 668 of 18 May 2011, published in the Official Gazette of Romania, Part I, no. 487 of 8 July 2011; Decision no. 1088 of 14 July 2011, published in the Official Gazette of Romania, Part I, no. 668 of 20 September 2011; Decision no. 921 of 7 July 2011, published in the Official Gazette of Romania, Part I, no. 673 of 21 September 2011; Decision no. 903 of 30 June 2011, published in the Official Gazette of Romania, Part I, no. 673 of 21 September 2011.
[127] Further, see T. Toader, M. Safta, *The Dialogue..., cited paper*.

legal order of the European Union. Consequently, the Court found that the proposed amendment is unconstitutional in relation to the provisions of Article 152 para. (2) of the Constitution concerning the limits of the revision of the Constitution[128].

Likewise, referring to the double conditionality stated in its established case-law concerning the use of a rule of European law within the constitutional review as a rule interposed to that of reference, the Court, having noted in a case that the invoked European Union acts have constitutional relevance, circumscribed its analysis to the concept of *national constitutional identity*, as it results from the expressly stated reason: "without violating national constitutional identity"[129].

Protection of the status of the Constitutional Court, in order to protect the rights and freedoms of citizens. Active role

♦ Sanctions for non-compliance with the decisions of the Constitutional Court

Consistently, the Constitutional Court stated, explained and underlined the effects of its acts. The critical attitude in relation to the non-observance of these decisions, expressed before 2003, especially when the courts were concerned, is expressed after 2003 and in relation to the executive/legislative authorities which, more or less directly, tried to circumvent those ruled by the Court. Thus, for example, the Court challenged the solution chosen by the Government to issue, even the day preceding the one established by the Constitutional Court to rule on the constitutionality of a law for approval of an emergency ordinance, a new emergency ordinance repealing the emergency ordinance approved by Parliament by law, but which full reiterates the content thereof, stating within the decision pronounced on that occasion that the concerned solution "*questions the constitutional behaviour of legislative nature of the Executive in relation to Parliament and last but least in relation to the Constitutional Court*"[130]. Similarly, within the *a priori* review, having ascertained the unconstitutionality of a law that preserved a legislative solution declared unconstitutional, the Court held that "*the adoption by the legislature of rules contrary to those ruled in a decision of the Constitutional Court, which aims at preserving the legislative solutions affected by flaws of unconstitutionality, violates the Basic Law*"[131]. As concerns the relations with the courts, an example in this regard is based on the decision by which the Court found the existence of a legal dispute of constitutional nature between the President of Romania, on the one hand, and the judiciary, represented by the High Court of Cassation and Justice, on the other hand, a dispute arose as a results of disregard by the High Court of Cassation and Justice of the Constitutional Court Decision [by which it was found the unconstitutionality of a law providing in a mandatory manner the promotion in rank of colonels and commanders, thus obliging the President of Romania to award those ranks, without giving him the possibility to assess whether to award or not such ranks], and it

[128] Decision no. 80 of 16 February 2014, published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014.
[129] Decision no. 64 of 24 February 2015, published in the Official Gazette of Romania, Part I, no. 286 of 28 April 2015.
[130] Decision no. 1257 of 7 October 2009, published in the Official Gazette of Romania, Part I, no. 758 of 6 November 2009.
[131] Decision no. 1018 of 19 July 2010, published in the Official Gazette of Romania, Part I, no. 511 of 22 July 2010.

stated that, according to Article 94 letter b) of the Constitution, the granting of the rank of general is an exclusive power of the President of Romania[132]. Thus, the non-observance of the Constitutional Court decisions by courts was indirectly sanctioned. Likewise, having ascertained the existence of a legal dispute of constitutional nature between the judiciary, on the one hand, and Parliament of Romania and the Government of Romania, on the other hand [given that, by two appeals in the interest of the law, the High Court of Cassation and Justice did not limit to just clarifying the meaning of certain legal rules or their scope of application, but, by invoking vices of legislative technique or flaws of unconstitutionality, it reinstated rules which applicability had ceased being repealed by normative acts of the legislative authority, a legal action which could only be achieved by the legislative authority], the Constitutional Court held that the High Court of Cassation and Justice has no constitutional power to carry out the constitutional review of legal provisions[133]. Perhaps the most vigorous intervention was achieved by Decision no. 206 of 29 April 2013[134], by which the Constitutional Court found as follows: "The exception of unconstitutionality raised in this case, upon examination of Article 414^5 para. (4) of the Code of Criminal Procedure, on an interpretation of legal provisions in the appeal in the interest of the law that led, as mentioned above, to the invalidation of a decision of the Constitutional Court. Because, in relation to the constitutional text of Article 126 para. (3) the phrase "interpretation on points of law", laid down in Article 414^5 para. (4) of the Code of Criminal Procedure can only regard the uniform interpretation and application of legal provisions by the courts, and the interpretation given to this phrase by the High Court of Cassation and Justice through Decision no. 8/2010 is unconstitutional, contravening the constitutional provisions of Article 1 para. (3) and (5) that enshrine the principle of legal certainty, those of Article 1 para. (4) on the principle of separation of powers – legislative, executive and judicial – in the framework of constitutional democracy, those of Article 126 para. (3) on the role of the High Court of Cassation and Justice, those of Article 142 para. (1) that "*The Constitutional Court shall be the guarantor for the supremacy of the Constitution*" and those of Article 147 para. (1) and (4) on the effects of the decisions of the Constitutional Court. Proceeding to such interpretation, the High Court of Cassation and Justice posed in court for judicial review of Decision no. 62/2007 pronounced by the Constitutional Court. Since this legal precedent seriously affects legal certainty and the role of the Constitutional Court, the Court found it necessary to penalise any interpretation of the provisions of Article 414^5 para. (4) of the Code of Criminal Procedure, governing the mandatory nature of interpretations on points of law by the High Court of Cassation and Justice by means of the appeal in the interest of the law, in that it would give this court the possibility, in this way, under an infra-constitutional rule, to give mandatory interpretations that are contrary to the Constitution and to the decisions of the Constitutional Court".

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132 Decision no. 1222 of 12 November 2008, published in the Official Gazette of Romania, Part I, no. 864 of 22 December 2008.

133 Decision no. 838 of 27 May 2009, published in the Official Gazette of Romania, Part I, no. 461 of 3 July 2009.

134 Published in the Official Gazette of Romania, Part I, no. 350 of 13 June 2013.

♦ The ascertainment of the unconstitutionality of the legal provisions which limited the powers of the Constitutional Court

Disputes arising around the enhancement of the powers of the Court, being conferred the power of constitutional review in relation to the resolutions of Parliament, were followed by the adoption of the Law amending Article 27 para. (1) of Law no. 47/1992 on the Organization and Operation of the Constitutional Court, which removed the power of the Court. Being referred to, within the *a priori* review, the Court upheld the objection of unconstitutionality[135] and found that the legislative solution excluding from constitutional review the resolutions of Parliament affecting constitutional principles and values is unconstitutional. On that occasion, the Court held that the legislative amendment for the purpose of the removal of the power of the Constitutional Court to adjudicate on the constitutionality of the resolutions of the plenum of the Chamber of Deputies, of the resolutions of the plenum of the Senate and of the resolutions of the plenum of the two joint Chambers of Parliament, without distinction, only diminishes the competence of the Constitutional Court, the fundamental authority of the State, and thus infringes the principles of the rule of law, leading to difficulties in the achievement of a proper state policy to strengthen and develop a democratic state where the observance of the Constitution, its supremacy and laws shall be binding. The Court underlined that the rule of law, democratic and social, should not remain a fundamental principle, with purely theoretical valence and no practical results, but a reality, properly accepted, both by public authorities and citizens. Or, the exclusion from the constitutional review of all resolutions of the plenum of the Chamber of Deputies, of the resolutions of the plenum of the Senate and of the resolutions of the plenum of the two joint Chambers of Parliament, is not based on the rule of law, but potentially on possible recitals which, by their essence, include subjectivity, interpretation and arbitrage, and the constitutional court is based on the rule of law, not on possibility. Therefore, this power cannot mean an "excessive" burden to the Constitutional Court, but it inextricably integrates, once it was legitimately granted, into a legal mechanism likely to contribute to the achievement of the principle of separation of powers in a democratic and social State, governed by the rule of law. To appreciate and to decide on the work of the Constitutional Court, especially in the light of quantitative standards, represent the inaccurate perception of its work and, furthermore, the ignorance of the essence of its fundamental role.

On the occasion of the initiative for the revision of the Constitution in 2014, it was proposed an implicit removal of the powers of the Constitutional Court which are currently enshrined only by the organic law. By Decision no. 80 of 16 February 2014[136], the Court ascertained the unconstitutionality of the concerned provisions. Thus, adjudicating on point 120 of the Sole Article of the legislative proposal for the revision of the Constitution, repealing the provisions of Article 146 letter l) of the Constitution – according to which the Constitutional Court "*fulfills other prerogatives stipulated by the organic law* [...]", the Court

[135] Decision no. 727 of 9 July 2012, published in the Official Gazette of Romania, Part I, no. 477 of 12 July 2012.
[136] Published in the Official Gazette of Romania, Part I, no. 246 of 7 April 2014.

noted that, according to explanatory statement, this repealing follows a recommendation that the Constitutional Court has made by Decision no. 799 of 17 June 2011 on the draft law for the revisions of the Constitution. The recommendation was justified by the circumstance according to which, under the constitutional text proposed for being repealed, "*the powers of the Constitutional Court can be multiplied whenever the interests of the political forces require the amendment or supplement of the law on the organization of the Court*". The Court also stated that, "*by discarding the constitutional provision, the independence of the constitutional court is ensured and the will of the original constitutional power concerning the Court's powers exhaustively referred to only in the Constitution is observed*". However, pointing out that, that in the recitals of the same decision, the Court held the need to supplement the provisions of Article 146 letters a) and c) of the Constitution in the sense of enshrining in the Constitution the standards referred to in Article 23 para. (1) and Article 27 para. (1) of Law no. 47/1992, texts that regulate the powers of the Constitutional Court to review the law for the revision of the Constitution adopted by Parliament and, respectively, to review the constitutionality of the resolutions of the plenum of the Chamber of Deputies, of the resolutions of the plenum of the Senate and of the resolutions of the plenum of the two joint Chambers of Parliament, the Court underlined that its recommendation did not concern a simple repeal of Article 146 letter l) of the Constitution, "because, in the absence of a contingent amendment of points a) and c) of the same Article, this repeal violates the provisions of Article 152 of the Constitution – The limits on matters of revision".

As concerns the power on the constitutional review of the law for the revision of the Constitution adopted by Parliament, the Court found that "it is compelling that the revision law adopted by Parliament, before being subject to a referendum under Article 151 para. (3) of the Basic Law, be examined by the Constitutional Court in order to establish, on the one hand, whether or not the decision of the Court on the draft law or on the proposal for the revision of the Constitution has been complied with and, on the other hand, whether or not the amendments and supplements to the draft law or to the revision proposal undergoing parliamentary debate and adoption are in compliance with the constitutional principles and provisions related to revision. In the absence of such a review mechanism, there is the risk to circumvent the generally binding effect of the decision of the Constitutional Court issued on the initiative for the revision of the Constitution and to deprive of efficiency the constitutional review performed, consequences that are incompatible with the principles of the rule of law and the role of the Constitutional Court". Strengthening the stated reasoning, the Court held, in the same Decision no. 80/2014 that, therefore, the legislature has designed this power of the Constitutional Court as being inextricably related to the one concerning the constitutional review of initiatives for the revision of the Constitution, recitals likely to substantiate a joint regulation and the adequate supplement of Article 146 letter a) of the Constitution as follows: "*a) to adjudicate on the constitutionality of laws, before promulgation, upon referral by the President of Romania, the President of Parliament, the Government, the High Court of Cassation and Justice, the Advocate of the People, of at least 50 Deputies or at least 25 Senators, as well as ex officio, on initiatives to*

revise the Constitution and the laws for the revision of the Constitution, prior to their approval through referendum".

As concerns the power of the Constitutional Court to review the resolutions of the plenum of the Chamber of Deputies, of the resolutions of the plenum of the Senate and of the resolutions of the plenum of the two joint Chambers of Parliament, this represents, according to the same Decision no. 80/2014 "the requirements of the rule of law and a guarantee for the fundamental rights and freedoms". On this occasion, the Court also held that, in this regard, the Venice Commission has noted that "with its Rules of Procedure and other general rules, Parliament however adopts normative acts, which are a yardstick for Parliament as a whole and its members individually. Judicial review of the application of such laws is an essential component of the rule of law. The absence of judicial review means that the majority in Parliament becomes the judge of its own acts. If only the majority can decide on the observance of parliamentary rules, the minority has nowhere to turn for help if these rules are violated. Even if the acts concerned are individual ones, this affects not only the rights of the parliamentary minority but, as a consequence, also the right to vote of the citizens who have elected the parliamentary minority". Therefore, "judicial review of individual acts of Parliament is therefore not only a rule of law issue but, as the right to vote is affected, even a question of human rights"[137].

The conclusion of Decision no. 80/2014 is that the constitutionalisation of the two powers currently regulated at infra-constitutional level is required by the repeal of Article 146 letter l) of the Constitution. Their removal through a simple repeal of the constitutional text under which they were regulated is likely to violate access to constitutional justice for the safeguarding of constitutional values, rules and principles, *i.e.* the removal of a guarantee for such values, rules and principles that also include the scope of fundamental rights and freedoms. For the above-mentioned recitals, the Court, unanimously, ascertained the unconstitutionality of the repeal of Article 146 letter l) of the Constitution, as this is in breach of the limits for the revision referred to by Article 152 para. (2) of the Constitution, insofar as it is not accompanied by the duly constitutionalisation of the Constitutional Court's powers.

International cooperation

The Constitutional Court of Romania was concerned with the development of bilateral relations with the constitutional courts of European countries in particular and with other similar courts/courts of law. Likewise, the Constitutional Court of Romania hosted conferences with a broad national and international participation.

Thus, as examples, in 2007, the Constitutional Court held the works of the Association of Constitutional Courts using the French Language. In 2009, in Bucharest, it was held the

[137] Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law no. 47/1992 on the Organisation and Operation of the Constitutional Court and on the Government emergency ordinance amending and supplementing Law no. 3/2000 on the organisation of a referendum of Romania, adopted by the Venice Commission at its 93rd Plenary Session, 14-15 December 2012.

works of the Preparatory Meeting of the Circle of Presidents of the Conference of European Constitutional Courts and in 2011 the Court held the XV Congress of the Conference. Delegations of all the European Constitutional Courts, as well as representatives of other constitutional courts and similar bodies attended the Congress, with the theme: "*Constitutional justice. Functions and relations with other public authorities*", as observers, among which the Commission for Democracy through Law (the Venice Commission), the Association of Asian Constitutional Court, the Association of Constitutional Courts using the French Language (ACCPUF), The Ibero-American Conference on Constitutional Justice, the Conference of the Constitutional Courts using the Portuguese Language, the Union of Arab Constitutional Courts and Councils, representatives of public authorities and personalities of scientific and cultural life in Romania. In 2012, it was organized a conference entitled: *Constitutional Review – Tradition and Perspectives*, an event dedicated to the 20th Anniversary of the Constitutional Court of Romania and celebration of the 100th years since the affirmation of constitutional review of laws in Romania. The meeting was attended by delegations of constitutional courts, namely of the Supreme Courts of Albania, Austria, Azerbaijan, Bulgaria, Cyprus, the People's Republic of China, Korea, Croatia, Georgia, Italy, Latvia, Lithuania, Luxembourg, Republic of Macedonia, the Republic of Moldova, Montenegro, Norway, Poland, Russian Federation, Serbia, Thailand, Turkey, Ukraine and Hungary, the President of the Commission for Democracy through Law (the Venice Commission) and special guests from universities and foundations that carry out cooperation programs in the field of constitutional justice. In 2013, with the support of the German Foundation for International Legal Cooperation (IRZ), the Constitutional Court hosted the International Conference on "The constitutional jurisdiction 20 years after the fall of the Communist Curtain". The Conference was attended by judges of constitutional courts in the countries of Central and South-Eastern Europe, Member States of European Union, representatives of the Romanian authorities of the State, as well as important personalities of academic and civil society. In 2015, the 14th meeting of the Joint Council on Constitutional Justice was held in Bucharest by the Constitutional Court of Romania in cooperation with the European Commission for Democracy through Law of the Council of Europe (the Venice Commission).

Since 2003, the Constitutional Court joined the World Conference on Constitutional Justice[138]. The Statute of the World Conference on Constitutional Justice was adopted on 23 May 2011 in Bucharest, at the XV Congress of the Conference of the European Constitutional Courts, held by the Constitutional Court of Romania.

It continuous cooperation underlined concerns and debates common for the constitutional judges, irrespective of the type of the court that performs the constitutional review and of its geographical area, as well as the integration of the Constitutional Court of Romania in what we may globally call the community of the constitutional courts.

[138] See the Statue of the World Conference on Constitutional Justice and its presentation, available on the website *www.venice.coe.int.*

IV. Conclusions

It has been almost half a century since the adoption of the Constitution and thereby the establishment of the Constitutional Court and the constitutional review. At this moment, we believe that we can refer to the creation of a tradition in this latter regard, a tradition of constitutional review in Romania inspired from the European model.

The experience of these years – and not by accident we referred to the contributions brought by the judges of the Constitutional Court through their studies, especially in the first years of existence of this Court – reveals the difficulties faced and overcome in the establishment and development of the constitutional review and, implicitly, of constitutionalism in Romania. A process of continuous and rapid acceptance, adaptation of the experiences the of other courts of constitutional review, the European Court of Human Rights and the European Court of Justice, but also of innovation and appeal to the national constitutional identity.

With an established case-law on the protection of the fundamental rights and freedoms, also confirmed within the dialogue with the European Court of Human Rights, with strengthened relations with other constitutional courts in Europe and worldwide, the Constitutional Court of Romania has also gained the authority to accomplish its role of guarantor for the supremacy of the Basic law. Of course that even the constitutional review is in continuous development and change at European and global level, as a consequence of the interaction of national constitutional courts and the international and supranational courts, under a continuous pressure both at national (Parliaments, Governments, courts) and international level[139]. Future developments in the constitutional review will develop this phase of constitutionalism which, in Romania, the constitutional review has acquired and proven.

At the end of this study, which intended to be a "radiography" of the development of constitutionalism in Romania, in terms of the development and strengthening of the constitutional review, not only by the decisions pronounced by the Constitutional Court, but also by the creation of a doctrine of constitutional law, we mention as follows:

♦ the Constitutional Court is the first and main interpreter of the Basic Law and, by the binding interpretation, it ensures its own development and of the constitutional law

When examining whether an infra-constitutional rule is in compliance with the Constitution, the Constitutional Court and the courts of constitutional jurisdiction necessarily perform the official interpretation of the Constitution, meaning that it explains and develops the constitutional principles and rules, and thus it remains a "living law". As revealed in connection with the experience of other Constitutional Courts, the emergence of the constitutional review and its development also results in the release of this conception regarding the fundamental laws, seen as "*living laws*"[140]. The meaning of these concepts or principles established by the Constitutional Court "*is socially*

[139] M. Tushnet, *cited paper*, p. 69.
[140] T. Birmontiene, *cited paper*, p. 163.

accepted and results in the state of constitutionality of the society", as well as in the removal of any possible divergence of interpretation between the other recipients of the constitutional rules, so as to provide also the constitutional base of lawmaking activity, namely of enforcement of the law, guiding the development of the whole legal system[141]. Of course that we cannot talk about the Constitution of Romania as concerns the terms of "*work in progress*" inspired from the Anglo-Saxon model[142], but certainly the interpretation of constitutional texts and concepts represents a complex process with multiple influences and that means the adaptation to new situations that have not been provided by the framer.

Thus, the Court and generally the courts of constitutional jurisdiction also "broaden" the scope of constitutional law. It was noted in this regard that it is now difficult to answer to the question "what legal reports/ relations are not covered by the constitutional law", as at any time a matter concerning the ordinary law can become an issue of constitutionality[143]. Likewise, not even the political issue can be seen anymore outside the constitutional review. The political activity, seen as the daily activity of the democracy, takes place within the limits of the Constitution, so that politics and constitutional law are complementary. It has been said in this regard that politics ends where constitutional law begins and that it violates the Basic Law when it exceeds its limits. The constitutional review must take account of these limits and, from this perspective, we also refer to the self-restraint of constitutional justice[144].

♦ any attempt to restrict the powers of the Constitutional Court would be likely to question the limits of revision

Each power of the Constitutional Court has revealed in time its role and significance. It is true that certain powers of the Constitutional Court have not been referred to yet for their exercise [the constitutional review on the international treaties – Article 146 letter b) of the Constitution, which has proven its significance and usefulness in other states[145]]. Even in the case of the most challenged of the current powers of the Court it was revealed their need for the rule of law; international bodies of reference which we mentioned in the contents of this study ruled in this regard. Regardless of the opinions that may be expressed and of the circumstantiation that can be achieved at a certain moment concerning the competence of the Constitutional Court in the fulfillment of these prerogatives, we believe that both their potential removal and reestablishment should be carefully considered under Article 152 of the Constitution – "The limits of the revision" –, taking also into account the recitals of the above-mentioned Decision no. 80/2014.

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141 XIV Congress of the Conference of the European Constitutional Courts – *Problems of legislative omission in constitutional jurisdiction, Vilnius, 2009* – General report published by the Constitutional Court of the Republic of Lithuania, p. 51.

142 A. Antoine, *Le Royaume-Uni: La mutation constitutionnelle permanente*, in *Les mutations constitutionnelle*, Collection Colloque, vol. 20, Société de Législation Comparée, Paris, 2013, p. 139.

143 T. Birmontiene, *cited paper*, p. 167.

144 R. Arnold, *Constitutional justice as a pillar of rule of law in European constitutionalism*, in Classical and modern trends in constitutional review, Feneya Publishing House, Sofia, 2012, p. 187.

145 See the Constitutional Court of Poland, the Constitutional Court of Germany.

It is true that it cannot mean a "blockage"/immobility, in the sense of the impossibility of the amendment of the constitutional rules that regulate the organization, operation or powers of the Constitutional Court. However, what we should consider, each time, in the impact on the protection/guarantee of the fundamental rights and freedoms, meaning that the proposed amendment/amendments should be in the sense of the development of standards in that matter, not their decrease. It should also be noted that, over time, proposals/suggestions have been made even by the judges of this Court and even by the Court itself, on the reorganization of the court or on the enhancement of its powers. Thus, for example, Vasile Geonea stated that "the number of judges should be increased from nine to twelve, the two Chambers of Parliament and the President should appoint four judges; [...] the judges should be specialized in, as follows: two in constitutional law, two in civil law, two in criminal law, two in commercial law, one in administrative law, one in civil procedure, one in private international law, one in financial law". Iulia Antoanella Motoc, former judge of the Constitutional Court proposed that to the competence of the Constitutional Court should be also extended on the settlement of the individual complaints brought against judgments pronounced in breach of the Constitution or of the Convention[146]. It has been stated that the competence of the Constitutional Court must be seen as an "internal jurisdiction", so that the applications brought before the ECHR shall also be conditioned by the completion of such internal procedural remedy. This idea has also been proposed by the Venice Commission, based on a study on individual access to constitutional justice, which covered various forms of such access in more than 50 countries. As underlined by the representative of the Venice Commission[147], one result of this study was that the free access to a constitutional court, not only against normative acts, but also against certain individual acts, such as in Spain and in Germany, allows an effective protection of human rights at national level. Where such access is available, citizens do not need to present their cases before the European Court of Human Rights as they are settled within their own country. The same representative stated that in this respect there is a clear trend of introducing individual access to constitutional justice in Europe.

Based on the powers conferred upon the Constitutional Court of Romania to also settle legal disputes of a constitutional nature, disputes that may arise between the three powers of the State – legislative, executive and judiciary, as well as on the elements of comparative law, Tudorel Toader, judge of the Constitutional Court, proposed that the judiciary power should also be involved in the process of appointing the constitutional judges; thus, "a judge should be appointed by the legislature, one by the executive and the third one by the judiciary"[148].

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146 I.A. Motoc, *The Constitutional Court of Romania and the European Court of Human Rights – evolution of a dialogue*, in the volume "Constitutional Court of Romania – 20 years of existence and 100 years of constitutional review", Universul Juridic Publishing House, Bucharest, 2013, pp. 30-41.

147 G. Buquicchio, *Individual access to individual justice – the cornerstone of an effective protection of human rights by the Constitutional Court*, in "The Constitutional Court of Romania – 20 years of existence and 100 years of constitutional review", Universul Juridic Publishing House, Bucharest, 2013, pp. 14-16.

148 T. Toader, *Controversies on the appointment of constitutional judges*, Editorial, in "Curierul Judiciar" no. 4/2011.

♦ the competence of the Constitutional Court in the fulfillment of its powers have been developed and reinterpreted in line with the international developments

Nowadays, the Constitutional Courts shall perform more than simply ascertain the compliance of the challenged legal provisions with the Constitution. Through the acts which they pronounce, the constitutional courts establish principles and rules, define the powers of public authorities, provide guidance and solutions on the interpretation of the Constitution, of infra-constitutional law, so as to be in compliance with the provisions of the Basic Law[149], and even "correct" legislative omissions, according to constitutional rules. In turn, these solutions, with a high degree of complexity, affect all regulatory system, as well as the enforcement of legal provisions within the general phenomenon of constitutionalisation of law. Referring to the Constitutional Court of Romania, the above-mentioned development[150] has been noted, as well as the importance of the recitals of the decisions, also binding together with their operative part[151], being underlined the role as a creator that attracted the observation of its role as a "positive and particular co-legislature", made for example by Professor Ion Deleanu, former judge of the Constitutional Court[152]. Thus, such development can also be observed in relation to the work of other courts of constitutional jurisdiction and which departs them from the traditional role of "negative legislature"[153].

♦ further, the "success" of the constitutional review falls within self-restraint and quality of the acts of the Constitutional Court

However, the development and strengthening of the competence of the Constitutional Court does not also mean discretionary conduct and the Constitutional Court shall act within the limits of its constitutional competence as a condition of its existence in the rule of law. Especially in relation to the political issue, the Court must express a *self-restraint* attitude, with clear separations starting from the work of each of its members and the avoidance of any influence of this kind. Similarly, the developments in the sense of being conferred the role of "co-legislature" must be maintained within such limits to which we referred. The Court cannot substitute the legislature, as the delivery of interpretative decisions must not lead to a substitution of courts. Moreover, a whole "catalogue" of the cases of constitutional inadmissibility[154] constitutes a guarantee of "self-restraint" of the Constitutional Court in the fulfillment of its constitutional role.

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149 For example, the Constitutional Courts of Austria, Estonia, Lithuania, Romania, Hungary.

150 M. Safta, *Developments in the constitutional review. Constitutional Court between the status of negative legislator and the status of positive co-legislator*, in the Review of the International Conference "Perspectives of business law in the third millennium", vol. I, nr. 1/2012, pp. 1-21.

151 T. Toader, M. Safta, *The Dialogue..., cited paper*, pp. 93-121.

152 I. Deleanu, *The Dialogue of Judges*, in "Revista română de jurisprudenţă" no. 1/2012, p. 36; see also I. Deleanu, S. Deleanu, *Case-law and jurisprudential upturn*, Essay, Universul Juridic Publishing House, Bucharest, 2013, p. 71.

153 For a comparative law analysis, see M. Troper, D. Chagnollaud, *Traite international de droit constitutionnel. Tome 3. Suprematie de la Constitution*, Dalloz, Paris, 2012, p. 150 and next.

154 T. Toader, M. Safta, *Causes of inadmissibility within constitutional jurisdiction*, forthcoming in "Dreptul".

Likewise, the quality of the acts of the Court, the consistency, the clarity of the grounds and their proportion represent a factor in imposing its authority. Referring to its own case-law, its continuity and consistency fall in the same line and represent a requirement imposed by the principle of legal certainty. But of course the power of precedent should not be generalized, as the jurisprudential upturn shall be thoroughly argued in order to clearly understand the recitals for which the Court departs from its own case-law.

♦ Constitutional Court: domestic and international transparency and dialogue

The transparency of the activity of the Court, including the adequate expression in relations with the media, is one of the ways in which it is close to the litigants. A special and particular instrument is The Constitutional Court Bulletin, whose publication was resumed in 2009 after almost 5 years of cessation. This should provide the relevant acts pronounced by the Court, but also create, at the same time, a platform of debates for their understanding and for the constitutional review in general.

Finally, a key to the development of constitutionalism is the strengthening of the dialogue of the constitutional judges, domestically and internationally, whose meanings regarding the development and strengthening of the democracy, of the rule of law, have been underlined in numerous arguments, by former and present judges of the constitutional courts. It was stated, among other things, that "the dialogue between the ordinary and the constitutional judge not only ensures the consistency of the constitutional legal orders, but also the constitutionalisation of certain legal regulations which are the object of their jurisdictional valuation. This dialogue is often the means of communication between national judge and that of the European Convention. The sporadic tensions between the ordinary and the constitutional judges merely confirm the existence of their relationship and its mutual benefit"[155]. As for the international dialogue, it has been stated that[156] even if it is not very visible, as long as some reasoning are appropriated by the constitutional courts without any express reference to the case-law of other courts, it grows in importance. The criteria according to which such reasoning become common substantiations of the recitals of the constitutional courts are the strength of the arguments and the reputation of the court which state them. Another criterion concerns the European Union membership, underlining thus a "union constitutional law" of the Member States. The comparative law is seen from this perspective as a "fifth method of interpretation", without being clear if it can be withheld any binding nature or it is held only as part of the European judicial culture. As regards the structural tensions between the formation of a European unit and the preservation of the constitutional principles, the harmonization lies in the Europeanization of constitutional law; the keywords the rights of citizens and the principle of democracy, which must guide the courts of constitutional jurisdiction in the

[155] For example, I. Deleanu, *The Dialogue between the constitutional and the ordinary judge*, in "Pandectele române" no. 12/2013, pp. 19-39.

[156] C. Grabenwarter, *General report and Outline of Main Issues – The Co-operation of Constitutional Courts in Europe – Current Situations and Perspectives*, available at *https://www.vfgh.gv.at/cms/vfgh-kongress.*

identification of strategies and the avoidance of disputes[157]. The amplification of the dialogue between constitutional courts at global level and the strengthening of the connections between them in the ways shown above, results in a phenomenon of emergence to common constitutional values, but also an extension of institutionalization of the constitutional review, reconsiderations regarding the competence and powers of the constitutional courts, reconsiderations and improvements of the acts of the constitutional courts, both in terms of its wording and its arguments on which it is based, having as consequence the strengthening of democracy, of the principles of the rule of law, of the protection of the fundamental rights and freedoms, but also of the strengthening the position and role of constitutional courts which are called upon to protect such values enshrined in the constitutions of the States[158].

[157] *Ibidem*.
[158] T. Toader, M. Safta, *The Dialogue..., cited paper*, pp. 124-140.