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Judicial Review: A Disputed Competence in the Romanian Legal System

The evolution of constitutional review in Europe in the final quarter of the twentieth century, especially after the expansion of *a posteriori* review, reveals an increase in the role and participation of the judge *a quo* in a field *ab initio* restricted to a special and specialized judge, namely the constitutional judge.

Romania is a good example in observing the relationship between the two categories of judges, having quite a tradition regarding constitutional review, which began more than a century ago. The involvement of the Romanian judge *a quo* in order to have their right to control laws recognized presents a double symmetry. It occurs at the beginning and at the end of the twentieth century, as well as at the dawn of the birth of a new Romania: in 1918, the Great Union occurs, and at the end of 1989, which marks Romania's break with totalitarian communism.

1. An arduous start

Affirmed, due to the praetorian input, as a natural competence of the judiciary, constitutional review in Romania has experienced quickly enough a reaction from the legislature, which, at first, limited judges' intervention, then eliminated it altogether and, finally, conferred it to another entity, an independent one, namely the constitutional court.[1]

Romanian law in general and Constitutional law in particular have been placed, in the past 150 years, under the strong influence of French law and, partly, of Belgian law, but the establishment of constitutional review in Romania shows a strong resemblance to what happened in the United States in the early nineteenth century. Then, the US Supreme Court, in a trial with a manifest political tint, *Marbury vs. Madison*,

[1] See M. Criste, "Constitutional Review in Romania – a Struggle Between Monologue and Dialogue" [in:] *Constitutional Courts and Ordinary Courts: Cooperation or Conflict?*, eds R. Arnold, H. Roth, International Conference Regensburg, 16–17 October 2015, Regensburg, Universitaetsverlag 2017.

asserted the right and duty of any judge, deducted from the Constitution's supremacy within the statutory system and from the separation of powers, to ignore the provisions of laws that would be inconsistent with constitutional norms.

The same political tint has made its mark on the *Tramways Trial* from 1912 since strictly legally speaking, art. 108 of the Romanian Criminal Code in force at the time, punishing those judges who refused to apply a law or who tried to suspend its enforcement, represented a serious obstacle to the judicial review of constitutionality.

Yet, the Romanian legal doctrine considered that, by carrying out a constitutional review, the courts did not infringe the principle of the separation of powers since they adjudicated specially and did not abolish the law generally.[2] For the High Court, since art. 77 of the Law on judicial organization forced judges, under oath, to apply the Constitution, the right of the judiciary to review the constitutionality of laws subsists even in the absence of express legal provisions. On the contrary, such provisions would have been necessary in order to deprive it of this right.

After the Revolution of December 1989, the Plenum of the Supreme Court of Justice,[3] asked at the end of 1990 to rule on the constitutionality of a 1950 decree, assigned itself this competence.[4] The Supreme Court concluded that the principle of the separation of powers results in the competence and duty of the courts of justice to review the constitutionality of the laws invoked before them and to refuse the enforcement of those which are contrary to the Constitution. Not only was it not necessary for this power to be solemnly proclaimed, but a mandatory statutory provision should have intervened in order to prohibit it.

Another argument justifying the judicial review of constitutionality was extracted from the courts' competence to interpret the laws. Bound to enforce both ordinary laws and constitutional provisions, the courts that would find themselves before a conflict between a law and the Constitution must remove the applicability of the ordinary law.

The Supreme Court also referred to the limits of the judicial review of statutes. The first concerns the effects of a decision pronounced following constitutional review, which can only be *inter partes*.

Another limitation was found in terms of the court's competence. After having asserted the right of the judiciary to review the acts of the legislature, the Supreme Court reached the solution adopted by the 1923 Constitution, namely that of a competence reserved uniquely to the Plenum of the Supreme Court of Justice. The argument was found in the position the latter occupied in the judiciary system, the importance this

[2] C.G. Dissescu, *Curs de Drept public român*, Bucharest 1890, p. 533; P. Negulescu, *Curs de Drept constituţional*, Bucharest 1927, p. 486 ; G. Alexianu, *Studii de drept public*, Bucharest, Vremea 1930, p. 70; G. Jèze, "Pouvoir et devoir des tribunaux en général et des tribunaux roumains en particulier de vérifier la constitutionnalité des lois à l'occasion des procès portés devant eux" [in:] *Revue de Droit Public*, 1912, pp. 138–139.

[3] The present High Court of Cassation and Justice, following the constitutional revision of 2003.

[4] For a detailed presentation of this decision, see: M. Criste, "Un contrôle juridictionnel des lois en Roumanie?" [in:] *Revue française de Droit Constitutionnel*, 1992 no. 9, pp. 179 *et seq*.

body of the judiciary had in achieving the rule of law, and the need to ensure the uniform enforcement of the laws.

Regarding the referral to the Court with a view to exercising constitutional review, with the exception of one judge only, the Plenum of the Court ruled that this right lay solely with the attorney general, the holder at the time of the extraordinary appeal.

Although the exception of incompetency should have taken precedence over any other exception, preoccupied firstly with the matters of substance of the trial, the Court wanted to rule on a decision of principle regarding the judicial review of norms. Finally, its answer was a "yes" to the right of the Court to review the constitutionality of laws and a "however" to the citizens' right to refer such matters to the Court.

2. An exclusive competence

After the Revolution of December 1989, the issue of the judges' control over the legislature became one of the major themes that the 1991 Constituent had proposed itself to solve, and a judicial review inspired by Western models was considered to represent a guarantee of democracy and, for this reason, it imposed itself as a matter of course.

The powers of the Constitutional Court can be classified in predominantly judicial powers and predominantly political powers.

The first category includes the anterior review exercised on laws,[5] the Chambers' Regulations and treaties or other international agreements,[6] the posterior review that covers enacted laws and government ordinances, as well as the review of the citizens' legislative initiatives.

In the second category, one finds the control of the constitutionality of political parties, the role of electoral judges in presidential elections, the endorsement of the suspension and vacancy of the function of President, the settlement of legal conflicts of constitutional nature between public authorities, the control or monitoring of compliance with the procedure for organizing and conducting referendums, and the confirmation of results.

The referral to the Constitutional Court, with a view to an anterior review of the laws, has as holders: the President of Romania, the presidents of the two parliamen-

[5] In 1991, the Court's power was limited in this area: the law which, before promulgation, was declared contrary to the provisions of the Constitution, was referred back to Parliament and in case the latter adopted it in the same terms by a majority of two thirds of the members of each Chamber, the objection of unconstitutionality was overruled and the promulgation became mandatory. Such a procedure was not provided, however, for the Chambers' Regulations, the Court's decisions regarding them being binding. The solution was subject to several criticisms, and a constitutional revision in 2003 provided arguments in support of this approach, forcing Parliament to submit to the decision of the Constitutional Court.

[6] The review of treaties or other international agreements was introduced only following the revision of October 2003.

tary Chambers, the Government, a number of 50 deputies or 25 senators, the High Court of Cassation and Justice and, following the revision of 2003, the Ombudsman. The review of the Chambers' Regulations shall be exercised upon referral from one of the presidents of the two Chambers, a parliamentary group or a number of at least 50 deputies or at least 25 senators, and that of treaties or other international agreements, upon request of the presidents the two Chambers, a number of at least 50 deputies or at least 25 senators.

For posterior review, the Court receives the referral directly from the court before which the issue of unconstitutionality was raised or from the Ombudsman.

The original text of the Law on the organization of the Constitutional Court provided that throughout the period of the settlement of the exception of unconstitutionality, judicial proceedings shall be suspended. Law no. 177/2010 removed this provision in order to discourage attempts to delay the settlement of lawsuits in the ordinary courts and the procedural rules of reforming a criminal decision have been amended as well, so that, subsequently, the sentence can be abolished.

The judgment[7] is done in plenary, the presidents of the Chambers and the Government being allowed to present written opinions. In its activity, the Court pronounces *decisions*, when examining the constitutionality of a statutory provision or a political party, *advisory opinions*, in the case of proposals to suspend the President of Romania, and *judgments*, in all other cases. These acts shall be pronounced with a majority vote, except for those referring to initiatives to revise the Constitution, when the vote of two thirds is needed. The decisions are published in the *Official Journal* of Romania, are generally binding and effective only for the future.

The provisions of laws and ordinances in force, as well as those from regulations, found to be unconstitutional, cease their legal effects within 45 days from the publication of the Constitutional Court's decision if, in the meantime, the Parliament or the Government, as the case may be, fail to amend the unconstitutional provisions as to render them consistent with constitutional provisions. During this lapse of time, the provisions declared unconstitutional are suspended by law.[8]

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[7] Until the amendment of Law no. 47/1992 by means of Law no. 138/1997, when judging preliminary rulings, the president of the Court appointed a panel of three judges. Appeals were judged by a panel of five judges, other than those from the court of first instance. If the appeal was upheld, the section of five judges also decided in matters of unconstitutionality.

[8] The Constitutional Court attempted to promote such a solution on a case-law basis (Decision no. 38 of 7 July 1993, *Official Journal*, I, no. 176 of 26 July 1993, pp. 1–11), which, however, divided the judges of the Court and caused a debate that ended in the victory of those who had opposed it. For its analysis, see M. Criste, *Controlul constituționalității legilor în România – aspecte istorice şi instituționale*, Bucharest, Lumina LEX, pp. 249 *et seq*.

3. Judges *a quo* assist the Constitutional Court

Judges *a quo* are required to assist the Constitutional Court in exercising the review of laws and in settling exceptions of unconstitutionality.[9]

In *a posteriori* reviews of the constitutionality of laws and Government ordinances, apart from the possibility of the Romanian Ombudsman to directly address the Constitutional Court, the latter can only be asked to pronounce itself by means of a decision of a judge *a quo*, given regarding an exception raised within a trial before the court by either party, including the prosecutor, or even by the judge, *ex officio* (art. 29 par. 2 of Law no. 47/1992, republished, on the Constitutional Court).

The manner in which judges *a quo* assist the Constitutional Court is expressed in their role in filtering the exceptions raised. Thus, judges refer to the Constitutional Court only those exceptions referring to the unconstitutionality of laws and ordinances that are in force, or any provision thereof, where such is related to adjudication of the case, regardless in which stage of trial proceedings or subject matter thereof (art. 29 par. 1 of Law no. 47/1992). A referral to the Constitutional Court can also be rejected if it concerns legal provisions that were declares unconstitutional in a prior Court decision (art. 29 par. 3 of Law no. 47/1992). The decision must contain the grounds for the exception, as well as the opinion of all the parties concerned, as well as of the court, regarding its admissibility.

Judges may deny referral to the Constitutional Court if the conditions provided in art. 29 par. 1–3 are not met by means of an interlocutory judgment, which is subject only to an appeal lodged to the superior court, within forty-eight hours of the pronouncement. The appeal shall be heard within three days. The filtration power conferred upon judges *a quo* can lead to their affirmation as competitors of the constitutional court in (rare) situations in which they might deny referrals based upon other reasons than those exhaustively laid down in art. 29 of Law no. 47/1992[10].

4. Judges *a quo* challenge the Constitutional Court

In recent years, we have witnessed a resurgence of ordinary judges' activism in implicitly challenging the monopoly of the Constitutional Court in the exercise of the constitutional review and in refusing to apply certain statutory provisions, even in competition with and contrary to the Constitutional Court's practice.[11] The "weapons"

[9] Cf. art. 146 [Powers] of the Romanian Constitution: "The Constitutional Court has the following powers: (…) d) it rules upon objections as to the unconstitutionality of laws and ordinances which are raised before the courts of law or commercial arbitration; a plea of unconstitutionality may also be brought up directly by the Advocate of the People."

[10] See T. Toader, M. Safta, *Dialogul judecatorilor constitutionali*, Bucharest, Universul Juridic 2015, pp. 291–292.

[11] V. Constantin, "Cum a produs Înalta Curte de Casație și Justiție un eveniment judiciar" [in:] *Noua Revistă de Drepturile Omului* 2008, no. 4, p. 56 *et seq.*

used in this approach are the provisions of art. 20 of the Constitution,[12] the supremacy of European Union law, the European Convention on Human Rights, and the case-law of the Court in Strasbourg. In other words, the resurrection of the constitutional review *à l'américaine* seems to be occurring in Romania through the invocation of conventional review, which is very similar, in terms of the review technique and effects, to constitutional review.[13]

On the other hand, the Constitutional Court extends its judicial review over court decisions by verifying the mandatory interpretations given through them.

4.1. *A quo* judges double constitutional judges

Judges *a quo* can thus turn to two different solutions in order to review the compliance of a statute with the fundamental rights and freedoms, as regulated by the Constitution, international conventions, and treaties; they either refer the matter to the Constitutional Court for constitutional review or decide to directly apply international rules, by means of a conventional review. Thus, we can note that judges have a dual loyalty: to their Constitutional Court and to the ECJ at the same time.[14]

Romanian judges feel encouraged in exercising conventional review both by the case-law of the Court of Justice of the European Union (CJEU), which considers that national judges may ignore decisions of the constitutional courts or the effects of such decisions if necessary for ensuring that European Union law is observed,[15] as well as by its own Constitutional Court. As it happened in France, in 1975,[16] the constitutional court pushed judges *a quo* toward conventional review when it decided that it was up to the judges, and not to the court, to directly apply Community legislation found to be in conflict with national law.[17]

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[12] Cf. art. 20 of the International human rights treaties: "(1) The constitutional provisions relative to the citizens' rights and freedoms shall be interpreted and applied in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties to which Romania is a party. (2) Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favorable provisions."

[13] O. Dutheillet de Lamothe, "Contrôle de conventionnalité et contrôle de constitutionnalité en France", http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/madrid_odutheillet_ avril_2009.pdf (accessed: 2020.08.01).

[14] G. Martinico, "Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order" [in:] *International Journal of Constitutional Law* 2010, vol. 10, no. 3, pp. 871–896.

[15] The *Winner Wetten* case, http://curia.europa.eu/juris/document/document.jsf?text=&docid=80771&pageIndex= 0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=68545 (accessed: 2020.08.01); the *Filipiak* case, http://curia.europa.eu/ juris/liste.jsf?language=en&num=C-314/08 (accessed: 2020.08.01).

[16] J.L. Debré, "Contrôle de constitutionnalité et contrôle de conventionnalité" http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/discours_interventions/2008/pdt_debre_afdc_ 06062008.pdf (accessed: 2020.08.01); O. Dutheillet de Lamothe, *loc. cit.*

[17] Decision of the Constitutional Court no. 1344 of 9 December 2008, published in the *Official Journal* no. 866 of 22 December 2008.

The monopolistic position held by the Constitutional Court in matters of constitutional review is most seriously threatened by the High Court of Cassation and Justice and its exercise of a relatively new competence, which has been attributed to it through the procedural code: appeals in the interest of the law (or reviews for a uniform interpretation of the law). This competence is based on the constitutional text itself, which, in art. 126 par. 3 of the Constitution, provides that "The High Court of Cassation and Justice ensures the uniform interpretation and application of the laws by all other courts, according to its competence."[18]

Within such proceedings, the High Court does not judge individual cases, but, in the case of the pronouncement of several contradictory judgments, it decides which interpretation is to be given to a certain statutory provision, the interpretation of which is binding on all courts from the date of the decision's publication in the *Official Journal* of Romania. Or, given its effects, the decision rendered in an appeal in the interest of the law can contradict and annihilate the effects of a decision of the Constitutional Court.

Thus, when asked by the High Court of Cassation and Justice to assess the unconstitutionality of a provision from the Law regarding administrative litigation (Law no. 554/2004), the Constitutional Court did not internalize criticism regarding the violation of the principle of the non-retroactivity of law (art. 15 (2) of the Constitution) and declared the respective provision constitutional.[19]

Since, according to art. 147 (4) of the Constitution, the decisions of the Constitutional Court are generally binding from their publication in the *Official Journal* of Romania, the High Court should have accepted this decision and apply it. However, it considered that the time has come to impose its own interpretation, bypassing the Constitutional Court's jurisdiction. Thus, through the decision of 4 June 2008,[20] the High Court considered that said text, declared as being constitutional, is not, however, applicable in the Romanian law, against the provisions of art. 20 of the Constitution, art. 6 of the European Convention on Human Rights, and art. 47 of the Charter of Fundamental Rights of the European Union, called upon in the light of the case-law of the courts in Strasbourg and Luxembourg, qualified all together as "the conventional block." What appears as obvious in this case is the wish of the High Court of Cassation and Justice to exercise constitutional review, in parallel with that performed by the Constitutional Court, and even contrary to its case-law.

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[18] Decision of the Constitutional Court no. 221 of 9 March 2010, published in the *Official Journal* no. 270 of 26 April 2010.

[19] Decision of the Constitutional Court no. 425 and Decision of the Constitutional Court no. 426 of 10 April 2008, published in the *Official Journal* no. 354 of 8 May 2008.

[20] Decision of the High Court of Cassation and Justice no. 2307 of 4 June 2008.

4.2. Constitutional judges assume, by praetorian way, judicial review over court decisions

In the face of a not very encouraging perspective, which Michal Bobek defined as a true *capitis deminutio*,[21] the Romanian Constitutional Court uses each and every opportunity to emphasize that the High Court of Cassation and Justice has no constitutional competence to create, amend, or repeal statutory provisions or to constitutionally review them.[22]

Perhaps the delicate situation in which the Constitutional Court of Romania finds itself is also due to the choice made by the 1991 Constituent, and maintained in 2003, not to place it within the judiciary, but to reserve for this court a place outside the system of powers.

It is beyond any doubt that court decisions are not subject to the judicial review of constitutionality exercised by the Constitutional Court. Nevertheless, the latter has indirectly recognized itself such competence in those instances where the diversion of legal rules from their legitimate purpose, by means of a systematic misinterpretation and misapplication by the courts or by other subjects called upon to apply the provisions of the law, may determine the unconstitutionality of the respective regulation. In such cases, the Constitutional Court considered that it does have the competence to eliminate the unconstitutionality defect thus created, essential in situations like these being the guarantee of the observance of the rights and freedoms of the people, as well as of the supremacy of the Constitution.[23]

Moreover, we can see lately that the Constitutional Court has been acting more and more courageously in censoring the manner in which the High Court of Cassation and Justice (ICCJ) rules when deciding upon appeals in the interest of the law or for

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[21] M. Bobek, "Consecințele mandatului european al instanțelor de drept comun asupra statutului curților constituționale" [in:] *Romanian Journal of European Union Law*, no. 1, p. 202.

[22] Decision of the Constitutional Court no. 838 of 27 May 2009, published in the *Official Journal* no. 461 of 3 July 2009.

[23] Decision 224 of 13 March 2012, of the Constitutional Court, published in the *Official Journal* no. 256 of 18 April 2012 (the very constitutionality of one of the interpretations that the criticized text of law received in practice was questioned), Decision no. 448 of 29 October 2013, of the Constitutional Court, published in the *Official Journal* no. 5 of 7 January 2014. "Without denying the constitutional role of the Supreme Court, whose jurisdiction is limited to situations of non-unitary practice, the Constitutional Court notes that, if a legal text might generate different interpretations, it is forced to intervene whenever those interpretations generate violations of fundamental provisions. The Constitution represents the framework and the scope within which the legislator and other authorities can act; thus, the interpretations that can be brought to the legal rule must take into account this constitutional requirement contained in Article 1 paragraph (5) of the Fundamental Law, according to which, in Romania, the observance of the Constitution and its supremacy is obligatory. From the perspective of the relation towards the provisions of the Constitution, the Constitutional Court verifies the constitutionality of the applicable legal texts in the interpretations that may be generated by them. Admitting a contrary thesis contradicts the very reason for the existence of the Constitutional Court, which would deny its constitutional role by accepting that a legal text be applied within limits that might collide with the Basic Law" (Decision no. 1092 of 18 December 2012, of the Constitutional Court published in the *Official Journal* no. 67 of 31 January 2013).

resolving legal issues, especially when, in doing so, the supreme court departs from or even contradicts the decisions of the constitutional judges. And in order to overcome the constitutional obstacle that does not mandate it to censor court decisions, the Constitutional Court does it in disguise, in the form of judicial reviews by way of pleas of unconstitutionality concerning the article of the law whose application has been interpreted by the ICCJ.[24]

Thus, recently, constitutional judges were notified with a plea of unconstitutionality of the provisions of art. 27 of the Code of Civil Procedure, in the interpretation given through the Decision no. 52 of 18 June 2018, pronounced by the High Court of Cassation and Justice – the Panel for resolving legal issues, to the provisions of art. XVIII par. 2 of Law no. 2/2013 regarding some measures for the relief of the courts, as well as for the preparation of the implementation of Law no. 134/2010 regarding the Code of Civil Procedure, with reference to the phrase "as well as in other claims assessable in money, with a value amounting to 1,000,000 lei inclusive," as well as the provisions of art. 521 par. 3 of the Code of Civil Procedure.

By Decision no. 369 of 30 May 2017,[25] the Constitutional Court admitted the plea of unconstitutionality of the legal provision limiting the exercise of the appeal, depending upon a certain threshold, and found that the phrase "as well as in other claims assessable in money, with a value amounting to 1,000,000 lei inclusive," contained in art. XVIII par. 2 of Law no. 2/2013, is unconstitutional. Following this decision, from the date of its publication in the *Official Journal*, the provisions of art. XVIII par. 2 had to be applied in the sense of the interpretation given by the Constitutional Court, namely that are subject to the appeal all the decisions pronounced after the publication of Decision no. 369 of 30 May 2017, in the claims assessable in money, less those exempted according to the criterion of the matter, expressly provided in the thesis included by art. XVIII par. 2 of Law no. 2/2013. By this decision, the Constitutional Court made no distinction, regarding its effects of admission, between the pending trials or those started after the publication of the decision in the *Official Journal*, but, in accordance with the provisions of art. 147 par. 4 of the Constitution, it has expressly stated that all court decisions pronounced after the publication are subject to appeal, regulated by art. XVIII of Law no. 2/2013, in the configuration given by Decision no. 369 of 30 May 2017.

By Decision no. 52 of 18 June 2018, pronounced by the High Court of Cassation and Justice – Panel for resolving legal issues, following Decision no. 369 of 30 May 2017, of the Constitutional Court, the notifications formulated as regards the pronouncement of a preliminary ruling were admitted and it was established that, in the interpretation

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24 In the opinion expressed by the Court of Appeal of Craiova, in the case held by the Constitutional Court by means of Decision no. 874 of 18 December 2018, published in the *Official Journal* no. 2 of 3 January 2019, the court underlines the fact that "the reasons for unconstitutionality concern the interpretation given to the text of the law by Decision no. 52 of 18 June 2018, pronounced by the High Court of Cassation and Justice - Panel for resolving legal issues, and not the unconstitutionality of the criticized text of law, in relation to the constitutional texts."

25 Published in the *Official Journal* no. 582 of 20 July 2017.

and application of the provisions of art. 27 of the Code of Civil Procedure, with reference to art. 147 par. 4 of the Romanian Constitution, the effects of Decision no. 369 of 30 May 2017, of the Constitutional Court occur regarding the court decisions pronounced after its publication in the *Official Journal* of Romania, in litigations assessable in money, with a value amounting to 1,000,000 lei inclusive, started after the publication of the decision (20 July 2017).

The Constitutional Court found that, according to the interpretation given by the Supreme Court through the preliminary ruling, although the legal provision that expressly suppressed the appeal regarding court decisions pronounced over claims assessable in money, with a value amounting to 1,000,000 lei inclusive, was found unconstitutional, it continues to be applicable to all pending litigations, registered with the courts prior to the date of publication of the decision of unconstitutionality. Or, such an interpretative solution has the significance of prolonging, in time, the effects of a rule found to be unconstitutional, with the consequence of its application within pending litigations, which leads to the violation of the provisions of art. 147 par. 4 of the Constitution, which enshrines the immediate and generally binding effect of the decisions held by the Constitutional Court.[26]

The Court thus held that the interpretation given by the Supreme Court, by means of its preliminary ruling, contrary to those ruled by a decision of the Constitutional Court, interpretation which invalidates the constitutional effects of a decision of the Constitutional Court, violates the Fundamental Law.

In this way, by means of the preliminary ruling, the High Court proceeds in a manner contrary to loyal constitutional conduct that it must prove toward the case-law of the constitutional court since its observance represents one of the core values that characterize the rule of law. Moreover, in the exercise of the attribution provided by art. 126 par. 3 of the Constitution, the High Court of Cassation and Justice has the obligation to ensure the unitary interpretation and application of the law by all courts, upon observing the fundamental principle of checks and balances, enshrined in art. 1 par. 4 of the Romanian Constitution and does not have the constitutional competence to establish, modify or repeal legal rules with the force of law or to carry out their judicial review of constitutionality.[27]

Instead of a conclusion, I will use a clarifying example.

When asked to pronounce itself on the exception of unconstitutionality of the provisions of Law no. 278/2006 amending and supplementing the former Criminal Code, which decriminalized the offenses of libel and slander, the Constitutional Court[28] found that there was no incompatibility between the principle of the freedom of expression and the criminalization of libel and slander that might have led to the

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[26] Decision no. 874 of 18 December 2018, of the Constitutional Court (previously cited).

[27] *Ibidem*.

[28] Decision of the Constitutional Court no. 62 of 18 January 2007, published in the *Official Journal* no. 104 of 12 February 2007.

decriminalization of such offenses and declared the law repealing the articles on their criminalization as being unconstitutional.

It was a powerful move on the part of the Constitutional Court, which turned itself into a legislator of positive law.

However, since the subject matter was the pronouncement of the unconstitutionality of a repealing rule, the jurisprudence and the doctrine were not unanimous in considering that the old regulation, the one incriminating the two offenses, was rightfully brought back into force. Taking advantage of this hesitation, the High Court of Cassation and Justice also chose to make its own powerful move and, mixing up repeal and unconstitutionality, ignored the decision of the constitutional judges, admitting the appeal in the interest of the law filed by the Attorney General and assessing that the provisions of the Criminal Code regarding libel and slender were no longer in force.[29]

It is hard to explain in what way a decision of the Constitutional Court is observed when the court declares as unconstitutional a repealing rule, as long as the dispositions of the repealed rule are still producing effects. On the other hand, the High Court decision implicitly recognized the possibility of the Parliament to force the application of an unconstitutional rule, in case it should refuse to reintroduce the old regulation in the objective law.

Yet, the "game" did not end here, since the Constitutional Court wanted to have the last word, even if it had to wait three years for the proper occasion to emerge. Apparently, it was almost impossible for it to have any more reactions since it has no powers over the constitutional review of judicial decisions. And yet...

When asked to pronounce itself on the exception of the unconstitutionality of the provisions of art. 414^5 par. 4 of the Code of Criminal Procedure (regarding the appeal in the interest of the law in criminal matters), with special reference to Decision no. 8/2010 of the High Court of Cassation and Justice pronounced through an appeal in the interest of the law, the Constitutional Court exceeded its powers once again. Under the pretext of reviewing the constitutionality of a legal provision art. 414^5 par. 4 of the Code of Criminal Procedure), the Court was, in fact, censoring the decision of the High Court since it did not pronounce itself regarding the constitutionality or unconstitutionality of the rule, but regarding the fact that the solution given to the legal problems analysed by way of Decision no. 8/2010 was unconstitutional[30].

It seems obvious that both courts have acted out of pride by exceeding their powers.

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29 Decision of the High Court of Cassation and Justice, United Section, no. 8 of 18 October 2010.

30 Decision of the Constitutional Court no. 206 of 29 April 2013, published in the *Official Journal* no. 350 of 13 June 2013.

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Summary

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The evolution of constitutional review, especially in Europe in the final quarter of the twentieth century, reveals an increase in the role and participation of the ordinary judge in a field restricted to the constitutional judge. The involvement of the Romanian judge *a quo* presents a double symmetry. It occurs at the beginning and at the end of the twentieth century, as well as at the dawn of the birth of a new Romania: in 1918, the Great Union occurs, and at the end of 1989, which marks Romania’s break with totalitarian communism.

Romanian law in general and Constitutional law in particular have been placed, in the past 150 years, under the strong influence of French law and, partly, of Belgian law, but the establishment of constitutional review in Romania shows a strong resemblance to what happened in the United States in the early nineteenth century.

After the Revolution of December 1989, a judicial review inspired by Western models was considered to represent a guarantee of democracy and, for this reason, it imposed itself as a matter of course. The powers of the Constitutional Court can be classified in predominantly judicial powers and predominantly political powers. Judges are required to assist the Constitutional Court in exercising the review of laws and in settling exceptions of unconstitutionality. But, in recent years, we have witnessed a resurgence of ordinary judges’ activism in implicitly challenging the monopoly of the Constitutional Court in the exercise of the constitutional review. In the face of a not very encouraging perspective of a true *capitis deminutio*, the Romanian Constitutional Court uses each and every opportunity to emphasize that the High Court of Cas-

sation and Justice has no constitutional competence to create, amend, or repeal statutory provisions or to constitutionally review them.

Keywords: judicial review, constitutional courts, juge *a quo*, exception of unconstitutionality, political constitutional review

Streszczenie

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Sądowa kontrola konstytucyjności prawa: kompetencja sporna w rumuńskim systemie prawnym

Ewolucja kontroli konstytucyjności prawa, zwłaszcza w Europie w ostatnim ćwierćwieczu XX w., spowodowała wzrost roli i udziału sędziego sądu powszechnego w zakresie spraw co do zasady zastrzeżonych do właściwości sędziego konstytucyjnego. Zaangażowanie rumuńskiego sędziego *a quo* przedstawia podwójną symetrię, gdyż zjawisko to występowało na początku i pod koniec XX w., a jednocześnie u zarania narodzin nowej Rumunii w 1918 r., kiedy doszło do powstania Wielkiej Unii, oraz pod koniec 1989 r., kiedy miejsce miało zerwanie Rumunii z totalitarnym systemem komunistycznym.

Prawo rumuńskie, a w szczególności prawo konstytucyjne, w ciągu ostatnich 150 lat znajdowało się pod silnym wpływem prawa francuskiego i częściowo prawa belgijskiego, jednakże wprowadzenie w Rumunii kontroli konstytucyjności prawa wykazuje silne podobieństwo do tego, co wydarzyło się w Stanach Zjednoczonych na początku XIX w.

Po rewolucji grudniowej w 1989 r. rozważano wprowadzenie w Rumunii sądowej kontroli konstytucyjności prawa inspirowanej wzorcami zachodnimi. Kontrola ta była postrzegana jako gwarancja demokracji i z tego powodu wydawała się wręcz koniecznością. Kompetencje rumuńskiego Sądu Konstytucyjnego podzielić można na uprawnienia o typowo sądowym charakterze oraz uprawnienia o charakterze politycznym. Sędziowie sądów powszechnych są zobowiązani pomagać Sądowi Konstytucyjnemu w dokonywaniu kontroli konstytucyjności prawa oraz rozstrzyganiu o niezgodności badanych norm z konstytucją. Jednak w ostatnich latach byliśmy świadkami odrodzenia się aktywizmu sędziów sądów powszechnych w sposób pośredni kwestionujących monopol Sądu Konstytucyjnego w zakresie kontroli konstytucyjności prawa. W obliczu niezbyt zachęcającej perspektywy prawdziwego *capitis deminutio*, rumuński Sąd Konstytucyjny wykorzystuje każdą okazję, aby podkreślić, że Wysoki Trybunał Kasacyjny i Sprawiedliwości nie ma konstytucyjnych kompetencji do tworzenia, zmieniania lub uchylania przepisów ustawowych jak również dokonywania kontroli ich zgodności z Konstytucją.

Słowa kluczowe: kontrola sądowa, sądy konstytucyjne, sędzia *a quo*, wyjątek niekonstytucyjności, polityczna kontrola konstytucyjności