

Challenges of Constitutional Justice in Romania

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Abstract: Constitutional justice represents an essential component of the rule of law, ensuring compliance with the Constitution and the balance between the powers of the state. In Romania, this role is fulfilled by the Constitutional Court, a fundamental institution with a key role in the democratic framework: it acts as the guarantor of the supremacy of the Constitution, the rule of law, and the principle of separation and balance of powers. According to Romania's Fundamental Law, the Constitutional Court is the guarantor of the supremacy of the Constitution, with the mission of ensuring that the entire body of legislation complies with fundamental norms and principles. The task of the Constitutional Court of Romania is not an easy one today, as constitutional justice faces multiple structural, institutional, and political challenges that affect citizens' trust in its decisions, and at times, their effectiveness. Among the dangers that affect legal security, which also represent challenges for constitutional justice, are the following: the intervention of the Constitutional Court in certain legislative processes or the adoption of decisions with high political impact, which often generate tensions between state institutions; legislative instability, which undermines belief in the perfectibility of the law, with the Constitutional Court often being called upon to rule on the lack of accessibility and predictability of legal provisions or on the abuse of the Government in regulating through emergency ordinances; non-compliance with the decisions of the Constitutional Court or the delayed or incomplete implementation of these decisions by the competent public authorities.

Keywords: Constitutional Court, challenges, constitutional justice, supremacy of the Constitution, legislative dynamics, binding decisions, educational role

Introduction

The Constitutional Court is defined by law as the only authority for constitutional jurisdiction in Romania, independent of any other public authority and subject only to the Constitution and its own organic law. "The fundamental law is the expression of the will of the governors, ultimately of the people, a will closely linked to the economic, social, political and cultural context of the society in which it is enacted. The supremacy of the Constitution is therefore not merely a statement, but must be a legal reality in any democratic state governed by the rule of law, with a series of legal consequences and guarantees, among which is the control exercised by constitutional courts." (Toader & Safta, 2015, p. 16).

The democratic legitimacy of constitutional review derives from the fact that constitutional judges are appointed exclusively by constitutional authorities directly elected by the people (the Chamber of Deputies, the Senate, and the President of Romania). According to Article 142 and the following articles of the Romanian Constitution, the Constitutional Court is composed of nine judges, appointed for a non-renewable, non-extendable term of nine years. Three judges are appointed by the Chamber of Deputies, three by the Senate, and three by the President of Romania. The judges of the Constitutional Court elect their president by secret vote for a three-year term.

„Judges of the Constitutional Court must have a higher legal education, high professional competence, and at least 18 years of experience in legal practice or higher legal education. Constitutional Court judges are independent in the exercise of their mandate and irremovable during their term.” However, because the appointment of Constitutional Court judges is carried out by three political institutions—the President of Romania, the Senate, and the Chamber of Deputies—there is sometimes suspicion of a mismatch between the constitutionally proclaimed independence and the political influence that may be exerted. This

suspicion undermines the Court's moral authority and public trust in the impartiality of its decisions, especially since the activity of this constitutional adjudication body is not subject to an external evaluation mechanism (such as those applied to other authorities). To counteract these suspicions, the Constitutional Court is constrained by certain external requirements—primarily that it cannot substitute the legislator—and by internal requirements, since its decisions must be justified through legal reasoning.

Thus, the modification or completion of a normative act, as a legislative event, cannot be achieved through an exception of unconstitutionality, but only through legislative mechanisms specific to the primary legislator—Parliament—or the delegated legislator—the Government. According to its organizing law, “The Constitutional Court shall rule only on the constitutionality of the acts it is seized with, without being able to modify or supplement the provisions under review.” Through the reasoning of a decision issued by the constitutional jurisdiction, the law cannot be supplemented, since, on the one hand, the Constitutional Court is not a positive legislator, and on the other hand, judicial courts do not have the competence to legislate by substituting the competent authority in this domain (Decision of the Constitutional Court no. 838/2009).

Sometimes, the challenge arises from the very role and competencies of the Constitutional Court, which are perceived by some litigants as a classical judicial court, rather than an autonomous constitutional authority. As a result, people often expect the Constitutional Court to intervene in the resolution of cases that fall under the jurisdiction of regular courts, or to issue decisions that would produce effects in cases already definitively judged.

Thus, the Constitutional Court is often called upon to rule on matters that exceed its jurisdiction, as they concern the interpretation or application of the law to specific cases. In this respect, the Constitutional Court has stated in its jurisprudence that it does not have the competence to interpret or apply the law in concrete cases, its role being strictly limited to verifying the conformity of laws and other normative acts with the Constitution. Consistently, the Court has reiterated that it is not an ordinary court of law and that it cannot intervene in the activity of interpreting and applying the law by judicial courts, as such interference would amount to an unconstitutional intrusion into the activity of the judiciary.

In this respect, through Decision No. 148 of April 16, 2003, the Constitutional Court emphasized that “it is not competent to review the manner in which judicial courts interpret and apply the law, as these matters fall under the exclusive jurisdiction of the judicial authority, in accordance with the provisions of Article 126 paragraph (1) of the Constitution.” This line of jurisprudence reflects a clear separation of powers and responsibilities between the Constitutional Court and the judicial courts, in accordance with the principle of the separation of powers in the state.

In its activity, it was also necessary to clarify the relationship between the decisions of unconstitutionality issued by the Constitutional Court and the decisions issued by the High Court of Cassation and Justice when it was called to rule in the interest of the law, in situations where the same legal issue had been inconsistently resolved by Romanian courts. Thus, in Decision no. 854/2011, the Constitutional Court held that: “In interpreting the law, the courts - including the High Court of Cassation and Justice - must respect the constitutional framework, and any transgression or violation of that framework falls exclusively within the jurisdiction of the Constitutional Court. The Constitution represents the framework and limits within which the legislator and other authorities may act; therefore, legal interpretations must also observe this constitutional requirement, as stipulated in Article 1 paragraph (5) of the Fundamental Law, which states that in Romania, the observance of the Constitution and its supremacy is mandatory. From the perspective of compliance with the provisions of the Constitution, the Constitutional Court verifies the constitutionality of legal texts as applied in the interpretation established through appeal in the interest of the law. To accept an opposite

view would run counter to the very rationale for the Constitutional Court's existence, which would be undermining its constitutional role by allowing a legal text to be applied in a manner that could conflict with the Fundamental Law."

From this perspective, for the proper functioning of the rule of law, cooperation between the branches of government remains essential and should be conducted in the spirit of constitutional loyalty. Loyal behavior is an extension of the principle of separation and balance of powers within the state.

Another challenge is harmonizing the decisions of the Constitutional Court with the case law of the European Court of Human Rights and the Court of Justice of the European Union. At times, conflicts of interpretation arise, particularly in areas concerning judicial independence or fundamental rights, raising delicate issues of constitutional sovereignty and the primacy of EU law.

A continuous challenge is posed by the current legislative dynamics in Romania. This refers to legislative instability, which severely undermines the principle of legal certainty, the inflation of legal norms, and the evident abuse by the executive branch in exercising its legislative powers. This results in a lack of coherence among regulations, as well as qualitative deficiencies, as laws are often not accessible or predictable for their recipients. Furthermore, Romanian legislation is frequently amended, sometimes without impact analyses or public consultation.

These phenomena generate numerous constitutionality challenges, placing considerable pressure on the Constitutional Court, which has become overburdened. As a result, cases are given excessively long deadlines for resolution, understandably frustrating the parties involved. Thus, in ruling on the constitutionality of a law adopted through an emergency procedure, the Constitutional Court highlighted the difficulties caused by the rapid pace of legislative changes.

Through Decision No. 198/2021, Decision No. 258/2006, Decision No. 366/2014, among others, the Constitutional Court laid down a series of principles that must be observed by both the Government and Parliament in the legislative process. It emphasized that the absence or lack of justification for the urgency of regulating extraordinary situations clearly constitutes a constitutional barrier to the adoption of an emergency ordinance by the Government.

To decide otherwise would render Article 115 of the Constitution, regarding legislative delegation, and would allow the Government to adopt emergency normative acts with the force of law at any time and in any field. Therefore, the issuance of an emergency ordinance requires the existence of an objective, quantifiable situation, independent of the Government's will, which endangers a public interest.

An analysis of the aforementioned case-law shows that only the existence of objective elements, which could not have been foreseen, may give rise to a situation that requires urgent regulation. The identification of such elements is the responsibility of the Government, which is required to justify its intervention in the preamble of the adopted normative act. Consequently, the decision to legislate belongs exclusively to the delegated legislator, who, if choosing to regulate a certain legal situation, must comply with constitutional requirements.

The Constitutional Court has stated that the deficiency regarding the existence and justification of urgency and extraordinary circumstances at the time of adopting a Government Emergency Ordinance cannot be remedied by Parliament through its approval by law. This is because the extrinsic unconstitutionality related to the adoption of the emergency ordinance inevitably leads to the unconstitutionality of the law approving it, in its entirety.

Such practices affect the coherence of jurisprudence and lead to the devaluation of the Romanian legislative system, undermining citizens' trust in state institutions. The current legislative dynamics actually reflect a crisis of legitimacy of the legislator, resulting in the weakening of the law's normative and value-bearing function. A genuine reflex is developing

among individuals to reject the law. The modern state suffers from a kind of “legislative bulimia”: legal norms are not given sufficient time to crystallize, and thus they are poorly drafted and uncoordinated with the broader legal framework.

In the stage following the resolution of cases by the Constitutional Court, another difficulty becomes apparent: the implementation of the decisions rendered. Among the responsibilities of the Constitutional Court of Romania are the following: it rules on the constitutionality of laws before they are promulgated, as well as on constitutional revision initiatives; it rules on the constitutionality of parliamentary regulations; it decides on exceptions of unconstitutionality raised before judicial courts regarding laws and government ordinances; it oversees compliance with the procedure for the election of the President of Romania and confirms the election results; it establishes whether circumstances exist that justify an interim in the exercise of presidential duties; it provides advisory opinions on proposals to suspend the President; it ensures the legality of referendum procedures and confirms their outcomes; it verifies whether the conditions are met for the exercise of legislative initiative by citizens; and it rules on objections regarding the constitutionality of political parties.

Following the 2003 revision of the Constitution, new responsibilities were added and the scope of subjects entitled to notify the Constitutional Court regarding laws and ordinances was expanded. Thus, the Ombudsman (referred to as Advocate of the People) was granted the authority to directly raise exceptions of unconstitutionality regarding laws and ordinances and to notify the Constitutional Court for an *a priori* constitutionality review of laws before promulgation. Also, the constitutional revision expressly enshrined the *erga omnes* (general binding) nature of the Constitutional Court’s decisions. However, their implementation is sometimes incomplete or delayed by the competent authorities. The consequences are serious: extended periods may arise during which legal norms remain non-compliant with the Constitution, and the authority of the Constitutional Court is undermined.

The Constitutional Court is obligated, in exercising its duties, to request opinions from Parliament, the Government and the Ombudsman regarding the constitutionality of the legal acts under review. It is also obliged to communicate its decisions, as appropriate, to the President of Romania, Parliament, the Government, or the judiciary, in accordance with its organizational law.

The constitutional review ends with decisions which, according to Article 147 of the Constitution, are binding and have effect only for the future. If a provision is found unconstitutional, the decision has *erga omnes* effect, so it is generally binding on all public authorities, citizens, and private legal entities. These decisions are sometimes referred to as precedents because, once a legal provision is declared unconstitutional, it can no longer be subject to constitutional review.

According to Article 147 paragraph (1) of the Constitution, the provisions declared unconstitutional cease to have legal effect 45 days after the decision is published, if within that period Parliament or the Government (as applicable) does not bring them into conformity with the Constitution. This provision eliminates the possibility for Parliament or the Government to keep in force a law or ordinance that has been declared unconstitutional. Thus, the legal norm is automatically suspended and, ultimately—if no action is taken by the original or delegated legislator—it ceases to produce legal effects. It disappears from the body of active legislation, from positive law, which makes the task of public authorities that apply the law more difficult in terms of determining the concrete effects of the Constitutional Court's decision on the cases they handle. For this reason, the Constitutional Court often specifies the effects the decision is to produce within its ruling.

In its jurisprudence (Decision no. 302/2012), the Constitutional Court stated the following: “The finding, through a decision of the Court, of the unconstitutionality of a legal provision produces *erga omnes* legal effects, a consequence deriving from the uniqueness and

independence of the constitutional jurisdiction. Conversely, a rejection decision also has general binding force and only applies for the future, under Article 147 paragraph (4) of the Constitution, in the sense that the public authorities involved in the case in which the exception was raised are required to respect the decision—both its operative part and the reasoning that underlies it—but the legal effect of such a decision is limited to the procedural framework of the case in which the exception was raised, and thus has *inter partes* effect. Therefore, the same legal provision may be re-submitted for examination before the Constitutional Court, given that new constitutional issues and grounds may be invoked that could justify a different solution in the future. The possibility of reiterating the same exception of unconstitutionality, in compliance with the legal conditions for its admissibility, may, within the framework of constitutional procedures, be converted into a kind of appeal, with a specific character, whose purpose and outcome are essentially the same as those pursued through a formal appeal: bringing before the Constitutional Court a legal provision on which it has previously ruled with a rejection, but now with the invocation of new aspects that could lead to a change in jurisprudence.”

Through Decision No. 898/2011, the Constitutional Court emphasized that: "To the extent that the Constitutional Court has found the constitutionality of the contested provision in a specific interpretation - resulting either directly from the operative part of the decision or indirectly from the correlation of the reasoning with the operative part - raising the same exception of unconstitutionality again, concerning the same provision and based on identical reasoning, amounts to undermining the generally binding nature of the Constitutional Court's decisions. This binding force also applies to decisions upholding the constitutionality of laws, ordinances, or specific provisions thereof."

The *erga omnes* opposability of the decisions of the Constitutional Court implies the constitutional obligation of all authorities to fully apply the Court's decisions to specific situations in which the norms declared unconstitutional are relevant. As such, courts are no longer required to interpret the decision's effect but must apply it in accordance with its reasoning to the case at hand. Moreover, the *res judicata* effect that accompanies judicial acts, including those of the Constitutional Court, attaches not only to the operative part of the decision but also to the reasoning that underpins it. Thus, both the reasoning and the operative part of Constitutional Court decisions are generally binding, pursuant to Article 147 paragraph (4) of the Constitution, and are equally mandatory for all legal subjects.

The mandatory nature of Constitutional Court decisions is a factor of constitutional stability and a driver of its development. Legal doctrine has noted: “If the multitude of social pressures on the Constitutional Court through exceptions of unconstitutionality is a destabilizing factor for the Constitution, the Court's decisions counteract this tension by clarifying which legal provisions should be used to resolve civil, criminal, or other types of cases. To the extent that these decisions absorb social changes, they give new meanings to constitutional terms and concepts, thereby enabling the Constitution's continuous renewal.” (Vida, 2004, p. 202). However, the same author cautions that formally proclaiming the binding nature of these decisions cannot be absolute, because if such decisions lack proper reasoning, their binding effect may undermine the Constitution's stability and erode the authority of the Constitutional Court.

If the Constitutional Court's interpretation of the texts and concepts of the Fundamental Law did not carry binding value, its role would be illusory. The effectiveness of constitutional justice, in the context of evident legislative instability, has deeply negative effects on the rule of law and legal certainty. Furthermore, the failure of the legislator to act following decisions of admission - and the implications of such passivity, particularly in criminal matters - has in some cases led to a judicial practice aimed at compensating for the legislator's inaction by identifying the applicable legislative framework and applying it, often by analogy, to the specific case. This judicial attempt, justified by the failure of the legislator to fulfill its

constitutional obligation to give legal effect to a provision as it remains after the Court's decision, often results in inconsistent application of the law.

In this regard, the Constitutional Court stressed in Decision No. 358/2022 that the situation created by the legislator's passivity after the publication of a ruling of unconstitutionality constitutes a violation of Article 1 paragraphs (3) and (5) of the Constitution, which enshrine the rule of law and the supremacy of the Constitution. The prevalence of the Constitution over the entire normative system is a core principle of the rule of law. However, the guarantor of the supremacy of the Fundamental Law is the Constitutional Court itself, through the decisions it issues, so the disregard of the findings and provisions contained in its decisions leads to the weakening of the constitutional structure that must characterize the rule of law.

Consequently, the Court found that the legislator ignored the provisions of Article 147 paragraph (4) of the Constitution, by failing to implement the binding effects of Decision No. 297/2018, resulting in a more serious unconstitutionality due to inconsistent application of the legal text. Moreover, the implementation of the Constitutional Court's decisions is absolutely necessary because, on one hand, both the unconstitutional normative acts and the subsequent acts based on them are removed from the body of active legislation; on the other hand, this process prevents the issuance of new unconstitutional acts.

Another challenge concerns the limited access of citizens to constitutional review. In Romania, litigants can only refer matters to the Constitutional Court indirectly, either through the Ombudsman or through the courts competent to adjudicate the case in which the individual is a party. This mechanism limits democratic control over legislation. The possibility of referring a case to the Constitutional Court via the Ombudsman, introduced with the 2003 revision of the Constitution, was intended to provide litigants with an additional legal instrument to safeguard constitutional rights and freedoms by triggering a constitutional review. However, as emphasized by the Constitutional Court, the direct raising of a constitutional exception remains entirely at the discretion of the Ombudsman, who cannot be compelled or prevented by any public authority from submitting such an exception. Consequently, the Ombudsman holds exclusive authority in deciding whether or not to raise an exception of unconstitutionality—an aspect tied to the institutional and functional independence of the Ombudsman (Decision No. 103/2020).

On the other hand, legal doctrine has proposed expanding the Constitutional Court's jurisdiction to include the resolution of individual complaints against judicial rulings that violate the Constitution or the European Convention on Human Rights. It has been argued that this jurisdiction should be viewed as a form of "internal judicial remedy," such that lodging complaints with the European Court of Human Rights (ECHR) would be conditional on first exhausting this domestic remedy. This idea has also been supported by the Venice Commission, based on a study regarding individual access to constitutional justice, which examined various forms of such access in over 50 countries.

As noted by a representative of the Venice Commission, one of the study's findings was that unrestricted access to the constitutional court, not only against normative acts but also against individual acts—as in Spain and Germany—enables effective protection of human rights at the national level. Where such access is available, citizens no longer need to turn to the ECHR, since their issues can be resolved domestically. The same representative also noted that there is a clear trend in Europe toward introducing individual access to constitutional justice. (Toader & Safta, 2015, pp. 29–30).

Conclusions

The analysis of these challenges facing constitutional justice highlights the need to strengthen the educational and preventive mission of the Constitutional Court, an institution that should play a formative role for the legislator and public opinion, not just act as an arbitrator between the

branches of government. This necessity stems from the idea that constitutional justice should not only have a sanctioning role (by declaring certain normative acts unconstitutional and thus deprived of legal effects) but also a proactive and formative one, aimed at preventing violations of the Constitution.

Thus, the Constitutional Court should serve as a reference point for public authorities and citizens regarding the understanding and application of constitutional principles. Through the value of the reasoning that underpins its decisions, the Constitutional Court promotes fundamental values such as the rule of law, separation of powers and fundamental freedoms. An example in this respect is Decision no. 415/2010, where the Constitutional Court provided detailed explanations concerning the relations between the Government and Parliament, with formative value for the legislature.

Regarding its preventive role, the Constitutional Court can contribute to preventing constitutional crises through predictable and coherent jurisprudence that serves as a guide for all public authorities. Success would mean that the legislator drafts laws taking into account all prior decisions of the Court in the legislative process because, as noted above, failure to respect constitutional standards leads to legal instability.

Constitutional justice in Romania is indispensable for guaranteeing the rule of law but requires reforms to ensure its real independence, transparency and a good relationship with European law. Only in this way will the Constitutional Court be able to become a genuine constitutional arbiter and a guarantor of authentic democracy. Cooperation and strengthening the dialogue between constitutional judges, both nationally and internationally, would ensure better protection of the common constitutional values of the European Union as well as the harmonization of law.

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