THE INFLUENCE OF THE CONSTITUTIONAL JURISDICTIONS ON THE BASIC LAWS

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Abstract

This paper intends to reveal the role played by the constitutional courts or other bodies entitled to perform the constitutional review of normative acts in enhancing the significance of the National Basic Laws and in developing their content. The research will try to show that the case-law created by the constitutional jurisdictions can shape the perception of the society on the Basic Law, offering a different perspective over its meaning. This is the effect of the interpretation of the Basic Law provisions, which is an inherent part of the constitutional jurisdictions' activity.

Keywords: *basic Law, supremacy, constitutional review, constitutional courts, amending of the Constitution*

1. Introduction

Constitutional jurisdictions are entitled to perform the constitutional review of normative acts. In order to do that, the constitutional judge has to evaluate the wording of the contested legal provision and, in the same time, the significance of the constitutional rules comprised in the Basic Laws which serve as benchmarks for the comparison. So, the interpretation of the Constitution is an inherent operation of the constitutional review. It has the potential to enhance its significance and to offer the efficiency required by the supreme character of the Basic Law. Due to the legal binding force of this interpretation, the content of the Basic Law is sometimes expanded and magnified. The constitutional jurisdictions case-law is taken into consideration especially by the legislative bodies that have the legitimacy to amend the Constitutions. The paper will study how different constitutional jurisdictions are involved in the process of supplementing the provisions of the national Basic Laws, with a special look to France, Germany, Italy and Spain. The comparative study includes Romania, as well, and analyzes to what extent the Constitutional Court has the possibility to improve the Romanian Basic Law and to make its provisions more protective for the citizens, for their fundamental rights and liberties.

The present study has been inspired by the recent idea that the traditional concept of "negative legislator" established by Hans Kelsen regarding the impossibility of constitutional jurisdictions to modify the reviewed normative act has to be reconsidered. This affirmation is proved by the increasing activism of various Constitutional courts. One of the most incisive study has been accomplished by Christian Behrendt[1]. It has been drafted from the point of view of the reviewed normative acts which can be supplemented this way. The present study tries to highlight the influence of the constitutional case-law on the Basic Law itself.

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[1] Christian Behrendt, *Le juge constitutionnel, un legislateur-cadre positif – Une analyse comparative en droit francais, belge et allemand*, (Bruxelles, Editura Bruylant, Paris, L.G.D.J.), 2006.

2. Overview of the legal theory concerning the supremacy of the Basic Law

Every state's legal system consists of a sequence of legal norms that spring one from another, organized in a pyramidal structure where the superior norms regulate the product of the inferior norms. This spatial image has been suggested by Hans Kelsen, the founder of the normative school of law in Wien. According to his theory, the unity and stability of this edifice is due to the interrelation established among its elements. More precisely, on the fact that the validity of a norm is based on the validity of the norm that regulated its creation and which, at its turn, has been generated by another norm. In other words, the validity ground of a legal norm lies in the positive superior norm that regulates its producing.

This concatenation has the supreme reason of validity in a hypothetical fundamental norm: the so-called *Grundnorm* on which is based the entire system[2] and ensures an adequate balance to the whole juridical edifice. This basic law is the Constitution of one state and represents the primordial source of every legal norm. Within the legal state's order, the Constitution has the highest position in the positive law, meaning the actual, vivid law, which is in force in a certain state, in a certain period of time[3].

The supremacy of the Constitution is a complex concept, which incorporates a range of specific features and elements and a diversity of political and legal values which express its prevalence not only in the legal system, but also in the whole social and political system of a state[4]. The essential consequence of the supremacy of the Constitution is the compulsory compliance of each and every legal norm with the constitutional provisions. Any deviation from its prescriptions has as a result the invalidation of the named legal norms[5].

This supreme character has been raised to the rank of a basic, fundamental rule, being, in most of the cases, specified in the constitutional content itself[6].

3. The importance of the constitutional review

The respect of the Basic Law's provisions and its supremacy is a duty that incumbes to all individuals, legal persons - private or public - and to all authorities, regardless of the field of activity. That is why it appeared the necessity of imposing an efficient control system in what concerns its observance. This mechanism resides in reviewing the conformity of the normative acts with the provisions and principles comprised in the Constitution. Thus, the constitutional review represents an effective guarantee of the supremacy of the Constitution.

The constitutional review is circumscribed to two models that are governing to different types of constitutional jurisdictions. On one hand, there is the so called „American model", typical for the United States of America and adopted also by countries like Denmark, Greece, Norway or Sweden. This kind of review is performed by courts which are part of the judiciary. On the other hand, there is the „European model", characterized by the existence of a specialized authority, distinct and detached of any other public authority. Hans Kelsen has developed this concept. The model he promoted had the advantage to prevent two major shortcomings of the American model: the fact that different courts could render divergent solutions over the same legal provision and the relative value of the judgements which had only *inter partes litigantes* effects. Setting up a unique constitutional

[2] Hans Kelsen, *Doctrina pură a dreptului*, (Bucharest, Humanitas, 2000), p.272.

[3] According to Mircea Djuvara, "The positive law is the secretion of the juridical conscience of a certain society" in *Teoria generală a dreptului*, 2nd vol., (Bucharest, All, 1995), p.406.

[4] Ioan Muraru et al., *Constituția României – Comentariu pe articole*, (Bucharest, C.H.Beck, 2008), p.18.

[5] Ibidem.

[6] For instance, in the Romanian Constitution it appears in Article 1 paragraph 5.

court that could centralize the whole constitutional review and which could materialize its assessing in a generally binding decision regarding the validity of a normative act represented a viable idea, which has been extended, in time, at a European level[7].

Louis Favoreu offered a revealing definition of this kind of authority: „A constitutional court is a jurisdiction especially and exclusively invested with the constitutional contentious issues, which is situated outside the ordinary jurisdiction and completely independent"[8].

As the famous professor noticed, the history of constitutional courts build on the European model is not very long. It began in 1920 with the establishment of the Czech Constitutional Court (by the Constitution of the 29th of February 1920) and of the High Constitutional Court of Austria (by the Constitution of the 1st of October 1920). The Spain Constitution of 1931 has created a Tribunal of Constitutional Guarantees which would last until the beginning of the general Franco's dictatorship. There is a second stage, situated after the Second World War: after the re-establishment of the Austrian Court in 1945, Constitutional Court of Italy has been founded in 1948 and the German Federal Constitutional Court in 1949. A few years later, in 1959, appeared the French Constitutional Council and then the Constitutional Court of Turkey in 1961. A third stage took place in the first years of the 70's and included the creation of the Portuguese and Spanish Constitutional Tribunal in 1976 and, respectively, in 1978. This movement extended in Belgium where has been founded La Cour d'Arbitrage in 1983 and had a great development in the Eastern European countries: Poland (1985), Hungary (1989), Czech Republic (1991), Romania (1991), Bulgaria (1991) and the ex-soviet republics (Moldova, Belarus, Armenia, Georgia etc).[9]

The Romanian Constitutional Court has been established by the provisions of the 1991 Constitution and it is the guarantor for the supremacy of the Constitution. The need of such an institution in the Romanian juridical landscape has been confirmed by the experience of the European countries having a much stronger constitutional tradition.

In most European countries, the constitutional courts - a general name for the bodies that perform the review of constitutionality, no matter if they are courts, constitutional tribunals or constitutional councils – are not part of the judiciary, *stricto sensu*. Their place in the constitutional ensemble of the state is different of the one hold by the ordinary or administrative courts. Many of them are *sui generis* court, opposite to the other three traditional authorities – legislative, executive and judicial. Only in isolated cases they are part of the judiciary, being juxtaposed to other state powers, including the highest courts.[10]

The constitutional review is a creative task and the constitutional judge has a much wider ability than the ordinary judge in what concerns the possibility to enrich the significance of legal provisions by means of interpretation and, most important, they are not bound to the inflexible application of the law[11].

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[7] As a matter of fact, Hans Kelsen was the one who, based on the Austrian Basic Law of 1920, has the most significant contribution to the establishment of the Constitutional Court of Austria. He has also been member of the Court between 1920 and 1929.

[8] Louis Favoreu, *Les cours constitutionnelles*, coll. „Que sais-je?", la 2eme edition, (Paris, Press Universitaires de France, 1992), p.3.

[9] Ibidem, 4.

[10] Michel Melchior, Andre Alen şi Frank Meersschaut, General Report on the XIIth Congress of the Constitutional Courts in Europe, Bruxelles, 14-16 mai 2002, *The Relations Between the Constitutional Courts and the Other National Courts, Including the Interference In This Area Of the Action of the European Courts*, (Brugges, Vanden Broele Publishers, 2002), p.73.

[11] Cappelletti, cited by Louis Favoreu in op.cit., p.463.

Instead of being "negative legislators" as Hans Kelsen defined them, the constitutional courts are slightly turning into a positive legislators or, at least, co-legislators.[12] Relevant in this respect is the case of Italy, Hungary or Portugal, countries where the constitutional authorities are entitled to review also legislative omissions of normative acts submitted to their jurisdiction.[13]

4. The impact of the constitutional review on the Basic Law

In order to perform the constitutional review, the constitutional courts extract the correct meaning not only of the checked legal provisions and also of the text of the Constitution to which the conformity of the norm is compared. Within the decision, the constitutional court offers an interpretation of the significance of their content. It has the ability to clarify their sense, in a manner suitable to shape a certain view regarding its approaching, to linger into the society a certain way of thinking, but also to facilitate the perception of their normative content. Starting from the remark of two famous constitutional scholars, according to whom "the interpreter of the law has a legislative power and the interpreter of the constitution has a constituent power"[14], there might be taken into consideration the creative valences of the constitutional courts case-law. There are also some scholars who affirmed that revealing the significance of the interpreted constitutional norm represents an act of creation and is the result of a cognitive process of evaluation of the meaning of the interpreted norm. One can say that the constitutional judge re-creates the norm in the specific circumstances of the situation referred to its jurisdiction[15]. From this point of view, the constitutional judge sometimes reshapes the content of the Basic Law, offering a new perspective over its provisions. The constitutional judge notices its deficiencies and resorts to the classical fundamental principles of law in order to establish the bench-marks necessary to perform the constitutional review.

For instance, in **Romania**, prior to the amendment of the Basic Law in 2003, the Constitutional Court has acknowledge by praetorian way the principle of check and balance of the powers[16] and the principle of the fair trial[17]. These have not been included *in terminis* in the 1991 Constitution. Still, the Constitutional Court has oftenly mentioned them in its decisions and they have been explicitly inserted in the amended Constitution[18]. In this respect, the Constitutional Court of Romania has acted in a similar way with other European constitutional courts which, on their turn, during their activity, have felt the need of innovation in what concerns the content of national Basic Law itself.

The **German** case could be suggestive in this regard, taking into consideration the fact that expressions like „the objective order of the fundamental rights values" (*objective Wertordnung der Grundrechte*), "the principle of proportionality" (*Verhältnismassigkeits-prinzip*), „effectiveness of the fundamental rights" (*Grundrechtseffektuierung*) do not appear in the wording of the German Basic Law, but they are the creation of the German Federal Constitutional Court which gave them constitutional value[19].

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[12] Ion Deleanu, *Justiția constituțională*, (Bucharest, Lumina Lex, 1995), 47.

[13] Michel Melchior, op.cit., 75.

[14] Georges Burdeau et al., *Droit constitutionnel*, Ediția 26, (Librairie Générale de Droit et Jurisprudence, 1999, Paris), p.59.

[15] Ioan Muraru et al., *Interpretarea Constituției. Doctrină și practică*, (Bucharest, Lumina Lex, 2002), 37.

[16] Decision no.96 of 1996, published in the Official Gazette of Romania, Part I, no..251 of the 17 th of Octombre 1996.

[17] Due to Article 11 and Article 20 of the Romanian Basic Law.

[18] For example, Decision no.183 of 2003, published in the Official Gazette of Romania, Part I, no.425 of the 17th of June 2003.

[19] A. Dyèvre, „La place des courts constitutionnelles dans la production des normes: l'étude de l'activité normative du Conseil Constitutionnel et de la Court Constitutitonnelle Fédérale (Bundesverfassungsgericht)", in *Annuaire international de justice constitutionnelle*, *2005*, (Marseilles, Economica, Presses Universitaires, 2006), 40.

France also offers a relevant example in this regard. Due to the constitutional review, the juridical security became a fundamental legal principle and the Constitutional Council has recognized its effects regarding the foreseeability and the quality of the law. Rendering the decision 2010-4/17 QPC[20], the Council has confirmed the existence of an implicit constitutional value consisting in the intelligibility and accessibility of the law.

There are constitutional benchmarks that can be invoked as grounds for priority preliminary ruling on the issue of constitutionality which can be divided into two categories[21]: some of them refer to the general interest and, in this respect, can be mentioned preservation of public order (Decision 80-127 DC)[22], the benchmark of ensuring continuity of public services (Decision 79-105 DC)[23] or the finding the criminal offenders (Decision 99-411 DC)[24]. The other category includes the constitutional rights concerning the social and economical field, like the right to health, the right to a decent dwelling (Decision 94-359 DC)[25] or the right to employment (affirmed by the 5th paragraph of the 1946 Constitution Preamble. These benchmarks can be used by the French Constitutional Council in order to review a normative act that appears to be contrary to them.

In the same respect, illustrative for the creative potential of the constitutional case-law is the fact that, more recently, the French Constitutional Council has stated that the human dignity represents a constitutional value, even if it is not *expressis verbis* mentioned in the French Constitution[26].

In a decision which became famous[27], the Constitutional Council has extended its review by reference to the Preamble of the French Constitution of 1958 and to the Declaration of the Rights of Man and of the Citizen of 1789. It is the so-called „block of constitutionality". This decision was the consequence of a previous one[28] which answered two important questions. The first one was if the provisions of the Preamble of the 1958 Constitution have normative value and the second one referred to power of the constitutional Council to assess the conformity of legal acts with the provisions of the Preamble of the Constitution. The answer was affirmative for both questions[29].

There is also in **Spain** a similar "block of constitutionality" that contains even more referential normative acts having constitutional value. It includes laws issued in order to distinguish between the powers of the State and those of different autonomous communities or in order to

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[20] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2010/2010-4/17-qpc/decision-n-2010-4-17-qpc-du-22-juillet-2010.48784.html.

[21] Bertrand Mathieu, "Neuf mois de jurisprudence relative à la QPC: un bilan" in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), p.67-68.

[22] French Constitutional Council, Decision 80-127 DC of 20th of January 1981 on the Law of reinforcing security and protecting personal liberties, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1981/80-127-dc/decision-n-80-127-dc-du-20-janvier-1981.7928.html.

[23] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1979/79-105-dc/decision-n-79-105-dc-du-25-juillet-1979.7724.html.

[24] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1999/99-411-dc/decision-n-99-411-dc-du-16-juin-1999.11843.html.

[25] http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1995/94-359-dc/decision-n-94-359-dc-du-19-janvier-1995.10618.html

[26] Decision 343-344DC of the 27th of July 1994, known as „bioetica" (cons. no.2), http://www.conseil-constitutionnel.fr/decision/1994/94-343/344-dc/decision-n-94-343-344-dc-du-27-juillet-1994.10566.html?version=dossier_complet.

[27] Decision 71-44 DC of the 16th of July 1971, known as „freedom of association" (cons.no.2): http://www.conseil-constitutionnel.fr/decision/1971/71-44-dc/decision-n-71-44-dc-du-16-juillet-1971.7217.html?version=dossier_complet.

[28] Decision 70-39 DC of the 19th of July 1970.

[29] Christian Behrendt, *Le juge constitutionnel, un legislateur-cadre positif – Une analyse comparative en droit francais, belge et allemand*, (Bruxelles, Editura Bruylant, Paris, L.G.D.J.), 2006, 113.

regulate and harmonize the powers of the latter. The State's territorial structure is not, in fact, defined only by provisions of the Basic Law[30], but also by frame-laws issued by the State in certain fields, relevant for its competence that provide the guiding lines which has to be respected in drafting the legislation of the autonomous communities.[31]

5. The influence of the Romanian Constitutional Court's case-law on the Romanian Basic Law due to its creative interpretation

Following the stream of thinking created by the constitutional authorities from different European countries, the Constitutional Court of Romania has rendered a series of eloquent decisions in this regard.

5.1. For instance, being asked to rule on whether there is a constitutional legal conflict between some state's authorities[32], the Constitutional Court has clarified the meaning of Article 109 of the Constitution, used an extensive interpretation, able to expand its normative content, but which, in the same time, is not distorting the will of the constituent power. On the contrary, it explains and reveals its genuine goal.

In that case, the Court has found the existence of a legal dispute of a constitutional nature between the Public Ministry – the Prosecution Office attached to the High Court of Cassation and Justice, on the one hand, and the Parliament – Chamber of Deputies and Senate –, on the other hand, in connection with the procedure to be followed for claims relating to the prosecution of members and former members of the Government for acts committed in the exercise of their office and who, at the time of referral, are also Deputies or Senators. The dispute has been generated by the different way of interpreting of the mentioned constitutional provisions. According to Article 109 paragraph 2 of the Basic Law, *„Solely the Chamber of Deputies, the Senate, and the President of Romania have the right to demand criminal prosecution be taken against Members of the Government for acts committed in the exercise of their office".* Analyzing this constitutional provision, the Constitutional Court assessed «that the term *„solely"* means that: „no one" other than the three public authorities may require prosecution and that it can not be initiated without referral to the Chamber of Deputies, Senate or the President of Romania, as appropriate. As for the conjunction *„and"* in the text of Article 109 paragraph 2, it signifies the end of a listing, which gives each of the three authorities it own competence. The constitutional text excludes both the cumulative power of requests of the three public authorities and the alternative power between the three authorities».

Regarding the meaning of this constitutional provision, the Constitutional Court has noticed that "the submission of referral to one of the three authorities to require prosecution can not be preferentially or randomly made by the Public Ministry – the Prosecution Office attached to the High Court of Cassation and Justice" The Court stated that "the solution is varied, depending on his quality of Deputy or Senator at the time of referral". It concluded that, consequently, the Prosecution Office attached to the High Court of Cassation and Justice must address the Chamber of Deputies or the Senate – for members of Government or former members of Government who at the time of referral, are also Deputies or Senators or the President of Romania – for members of Government or former members of Government who at the time of referral, are not also Deputies or Senators.

In this way, it is established, unequivocally, a benchmark according to which the Prosecution Office attached to the High Court of Cassation and Justice is going to refer one of the three public

[30] Decision 10/1982 of 23rd of March 1982.

[31] Pierre Bon, "La question d'inconstitutionnalité en Espagne", in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), 130.

[32] Decizia nr.270 din 10 martie 2008, publicată în Monitorul Oficial al României, Partea I, nr. 290 din 15 aprilie 2008

authorities in order to demand the prosecution of members of the Government in office or of former members the Government.

The Constitutional Court has also noted that "otherwise the provisions of Article 109 paragraph 2 first sentence of the Constitution would become inapplicable as concerns the right of the Chamber of Deputies and the Senate to demand prosecution of members and former members of Government who also act as MPs, leaving to the discretion of the Public Ministry to decide, by itself, to which of the three authorities it should address the referral".

5.2. On a different occasion, assessing over the existence of another legal dispute of a constitutional nature[33] the Constitutional Court has used a *par analogie* interpretation of a constitutional provision and has supplemented it in some way. Upon settlement of the legal dispute raised in the case, the Constitutional Court noticed that it has to give a proper interpretation to the texts of the Basic Law, as to grasp from their letter the spirit that governs the matter.

In the case, it had to adjudicate on the request for the settlement of the legal dispute of constitutional nature between the President of Romania and the Prime Minister concerning the refusal of the President to appoint Mrs. Norica Nicolai to the office of Minister of Justice and on the legal grounds invoked by the parties.

Article 85 paragraph (2) of the Basic Law does not provide how many times is the President of Romania entitled to ask the Prime Minister to make another proposal or the Prime Minister's obligation to come with a different proposal than the initial one.

The Court stated that it must search the meaning of the rule under Article 85 paragraph (2) of the Constitution both in the letter of this text and in the basic principles and in the spirit of the Basic Law.

Regarding the number of cases in which the President of Romania may ask the Prime Minister to make a different nomination for the vacant office of minister, the Court found that, in order to avoid the occurrence of an institutional blockage in the lawmaking process, the constituent legislator provided under Article 77 paragraph (2) of the Basic Law, the President's right to return a law to Parliament for reconsideration, only once.

The Court found that "this solution acts as a constitutional principle in the settlement of legal disputes between two or several public authorities which have conjoint duties in the adoption of a measure provided by the Basic Law and that this principle can be generally applied in similar cases.

Applied to the process of government reshuffle and appointment of some ministers in case of vacancy of the offices, this solution could eliminate the blockage generated by the possible repeated refusal of the President to appoint a minister at the proposal of the Prime Minister.

[…] The limitation to a sole rejection of the proposal is justified by the fact that, further, the answerability for a different nomination rests exclusively with the Prime Minister.

[…] As in case of all the other prerogatives provided by the Constitution, the President is politically answerable before the electorate for the reasons for which he declined the proposal of the Prime Minister, such as the Prime Minister and the Government are politically answerable before the Parliament.

As concerns the Prime Minister's possibility to reiterate his first proposal, the Court finds that such possibility is excluded by fact that the President of Romania declined the proposal from the beginning. Therefore, the Prime Minister must nominate a different person for the office of minister."

5.3. In another decision[34], the Court has proceeded to an elaborate analyze of the ideas contained in Article 115 paragraph (4) of the Basic Law which comprises the conditions of

[33] Decision no.98 din 7 februarie 2008, published in the Official Gazette of Romania, Part I, no.140 of 22nd of February 2008.

[34] Decision no. 255 of the 11th of May 2005.

legislative delegation of power according to which to the Government may adopt an urgency ordinance in the following conditions, met cumulatively: the existence of an exceptional situation; the regulation cannot be delayed; the ordinance must contain the reasons for that urgency. The Court noticed that «beside the trenchant character of the formula used by the constituent legislator, its intention or purpose, consisting in the restriction of the field in which the Government may substitute the Parliament, adopting primary norms for certain reasons which it is sovereign in determining, are clearly underlined by the difference between the constitutional text in force and the previous one, former Article 114 paragraph (4) of the Constitution, in its initial form. According to that text, Government's possibility to adopt urgency ordinances was conditioned exclusively by the existence of certain exceptional cases.

The term „exceptional cases" used in the former wording was replaced, in the new wording, with that of „exceptional situations". Moreover, although the difference between the two terms, from the point of view of the degree of deviation from ordinary or common which they express, is obvious, the same legislator felt that it is necessary to clarify these aspects and not to leave any interpretation that would minimize such difference, by adding the collocation „which call for regulations without delay", enshrining, thus *in terminis* the imperative of the regulation urgency. Finally, for reasons of legislative rigor, it instituted the exigency on the statement of the reasons for the urgency in the very content of the ordinance adopted outside a law of delegation.

Even under the empire of the previous constitutional regulation in the matter, the Court, referring to the exceptional case, of which was depending the constitutional legitimacy of the adoption of an urgency ordinance, was stating that this is defined in relation with „the necessity and urgency of the regulation of a situation which, because of exceptional circumstances, imposed the adoption of immediate solutions, in order to avoid a serious breach of the public interest"[35]. For the same purpose, of a better defining of the exceptional case, the Court mentioned this is characterized by its objective character, „in the sense that its existence does not depend on the Government's will, which, in such circumstances is compelled to react promptly in order to defend a public interest by urgency ordinance"[36].

The aspects stated by the Court in this matter, under the empire of the previous constitutional regulation, as a result of a interpretation that was transgressing the letter of the constitutional text, underlying its meaning in light of the intention of the constituent legislator and of the purpose, as well by using certain principles and constants of the law, are even more pertinent, today, if we have in view the fact that the viewpoint present has full support precisely in the letter of the constitutional regulation of reference, in its present wording.

The Court's influence over the legislator's activity is obvious in this kind of situations. When upholds the unconstitutionality of an urgency ordinance on the ground of the lack of sufficient reasoning of the urgency and on the failing in proving the necessity of such regulation, the Court invalidated, on utility grounds, the normative acts. In the same fore/mentioned decision[37], the Court held that in the preamble of the urgency ordinance approved through the criticized law, the urgency character is determined by the opportunity of identifying shortly a rational and long lasting situation for assuring the necessary means for the preservation, restoration and maintenance of the national, cultural and religious patrimony of Suceava county, issue that concerns the social interest and that constitutes exceptional situation.

[35] Decision no.65 of 20th of June 1995, published in the Official Gazette of Romania, Part I, no.129 of the 28th of June 1995.

[36] Decision no.83 of May 19th 1998, published in the Official Gazette of Romania, Part I, no.211 of the 8th of June 1998.

[37] Decizia nr. 255 din 11 mai 2005.

The reproduced text underlines the reason and the utility of this regulation, but not the existence of an exceptional situation which regulation cannot be delayed, which it proclaims, without setting forth the reasons, as requested by the constitutional text.

Or, "invoking the element of opportunity, subjective by definition, to which is conferred a determinant contributing efficiency of the urgency, which, implicitly, converts it in exceptional situation, leads to the conclusion that it does not have, necessarily and unequivocally, an objective character, but it can give expression also to certain subjective factors, of opportunity, in which account, moreover, this regulation was adopted by means of ordinance. But as such factors are quantifiable, the affirmation of the existence of the exceptional situation, in their account or by converting them in such situation, confers it an arbitrary character, which would create insurmountable difficulties in the legitimacy of the legislative delegation. Thus, we would find ourselves in the situation in which a constitutionality criterion – the exceptional case –, which observance is by definition submitted to Court's review, to be, practically, not control as such, which would be inadmissible.

6. The influence of the constitutional courts' case-law in the case of revision of the Basic Law

6.1. Some constitutional courts of some countries, like Moldova, Ukraine, Romania or Turkey, are expressly empowered to review the constitutional amendments.

Others, like the German Constitutional Court, held that it can review the conformity of constitutional amendments with the substantial limits expressly written in the text of the Constitution[38].

Even if the constitutional review of Basic Law amendments is not listed among the powers granted by the Italian Constitution to the Italian Constitutional Court, the constitutional jurisdiction in this country has stated that it has the ability to check the compliance of procedural conditions required by Article 138 of the Basic Law for adopting constitutional laws[39]. Moreover, considering that the Basic Law contains "supreme principles" which has to be also respected on the occasion of amending the Basic Law, the Constitutional Court of Italy has verified the substance of the amendments[40].

On the contrary, the French Constitutional Council has chosen a different approach, adopting a self restraining attitude regarding the sovereign constituent legislator[41].

The Constitutional Court of Romania is one of the few constitutional authorities in the world that is empowered by the Basic Law's provision to perform the constitutional review over the constitutional amendments. The constituent power has offered to the Constitutional Court the opportunity to render valuable judgements meant to guide the Parliament in what concerns the drafting of proper amendments to the Basic Law. The new draft has to suit the level of democracy to which the Romanian State is making for, the present stage of European political development. This is the reason why the opinion of the Court expressed in its decisions has to found a reflection in the new drafting of the amended Constitution, Such a conclusion is the logical consequence of the role of the Constitutional as a guarantor of the supremacy of the Constitution.

[38] Kemal Gözler, *Judicial Review of Constitutional Amendments – A Comparative Study*, (Bursa, Ekin Press, 2008), 84.

[39] Jean-Jacques Pardini, "Question prioritaire de constitutionalité et question incidente de constitutionalité italienne: ab orgine fidelis" in *Pouvoirs, Revue française d'etudes constitutionnelles et politique*, 137(2011), p.116.

[40] Decision no.1146 of 15th of December 1988, cited by Jean-Jacques Pardini in op.cit., p.116.

[41] Jean-Jacques Pardini in op.cit., 116.

The Constitutional Court has rendered several decisions based on this power and, every time, has expressed various critical remarks regarding the legislative project of amending the Basic Law. Some of the suggested solutions, meant to correct the deficiencies of the draft will be presented in the followings.

6.2. The contribution of the Romanian Constitutional Court at the improvement of the Romanian Basic Law on the occasion of its revision in 2003[42]

Assessing over the suggestion contained in the project regarding the right to the private property, the Court noticed that after the provision of Article 41 Paragraph 7 that provides that *"Lawfully acquired assets shall not be confiscated. Lawfulness of acquirement shall be presumed"* there has been inserted a new paragraph in which circumstantiates this presumption and establishes that it is not applied for *"any goods intended for, used or resulting from a criminal or administrative offence"*.

The Court held that this wording could be criticized and that it might lead to confusions. Thus, if the text meant to permit the confiscation of the goods acquired lawfully, but which was based on a quantity of money results from criminal offences, its wording was inappropriate. From the wording of the newly introduced Paragraph (7^1) resulted that it meant the reverse burden of proof on the licit character of the assets, being provided the illicit character of the goods acquired through the capitalisation of the incomes resulted from criminal offences.

The Court has reminded its own previous case-law adjudicated by Decision no.85 of September 3rd 1996, published in the Official Gazette of Romania, Part I, no.211 of September 6th 1996, occasion in which was stated that the juridical security of the right to property over goods that constitute wealth of a person is indissolubly connected of the presumption of the lawfully acquiring of the goods. The Court has underlined that the removal of this presumption has the significance of the suppression of a constitutional guarantee of the right to property, which is contrary to the provisions of Article 148 paragraph (2) of the Constitution. Therefore, the objective aimed on this way is unconstitutional.

Reexamining the project of amending law, the Parliament took into consideration the Courts conclusion and has kept untouched the presumption of lawfully acquired of the assets.

Nevertheless, only eight years after, the same issue has been raised again and the idea of rejecting this presumption reappeared in the contemporary political landscape[43]. The latest revision project of the Basic Law completely eliminated the fore-mentioned presumption. Consistent with its own case-law, the Court stated[44] that such a provision is unconstitutional.

The role played by the Court in the process of genesis of law and, in particular, of the Basic Law is also underlined by another idea contained in the Decision no.148 of 2003. The Court has sanctioned the legislative technique shortcomings contained in the body of Article 19 paragraph 1 of the Basic Law, namely its inner antinomical structure: in the first thesis is alleged Romanian citizen's right not to be extradited or expelled. Instead, in the second thesis is alleged the contrary, namely that Romanian citizens may be extradited based on the international agreements Romania is a party to, according to the law and on reciprocity basis, which reflects a wording fault/deficiency.

[42] Decision no.148 of the 16th of April 2003, published in the Official Gazzette of Romania, no.317 of the 12th of May 2003.

[43] This matter has been analyzed in the past through the Decision no.85 of the 3rd of Septembre 1996, published in the Official Gazzette of Romania, no.211 of the 6th of September 1996.

[44] In the Decision no.799 of the 11th of June 2011, published in the Official Gazzette of Romania, no.440 of 23rd of June 2011.

Following this remark, the Parliament has corrected the deficient drafting, introducing the possibility of extradition of the Romanian citizens only as an exceptional provision, on the grounds of reciprocity, based on the international treaties to which Romania is a party.

It is to be noticed also the Parliament's reluctance in taking into consideration of some suggestions expressed by the Constitutional Court which were meant to improve the normative content of the Basic Law. For instance, regarding the educational system in Romania, the Court has noticed that, according to the new wording of the provisions under Article 32 paragraph (5) the education may be carried out in State or private establishments, thus being instituted a dichotomy specific to the most profound legal constructions. The Court has stated that the insertion of this new criterion, the confessional one, is not connected with the dichotomy logic, adding to a logical criterion a new determination, inadmissible by the fact that it can be found in the two, defined in the present by the Constitution. Thus, confessional education neither is excluded from the private nor from the state education. Therefore, there is a confessional education both private and public, which justifies the amendment, under this aspect, of the Basic Law. The Court considered that the examined norm would have become coherent if the logical pair of confessional, respectively lay education is inserted in the text submitted for revision. Thus, the new constitutional text would have provide that education of all levels may be lay or religious and conducted in Stat or private institutions, according to the law.

Despite the lack of coherence highlighted by the Court, the Parliament has ignored the correction suggested by the Court[45].

6.3. The constitutional review of the legislative proposal for the revision of the Constitution of Romania in 2011

Assessing *ex oficio* on the recent initiative of amending the Basic Law, the Romanian Constitutional Court has rendered the Decision nr.799 din 17 iunie 2011[46] and has drawn a series of recommendations which represent, in fact, genuine proposals of amending the Basic Law.

The suggestion concerned the national minorities right to identity, the State's liability for damages caused by judicial errors, the Parliament's Standing Orders, the fields regulated by organic laws, conditions for the nomination and removal from the office of the members of the Government, the conditions for organizing the referendum, the narrowing the possibility of assuming by the Government of responsibility before the Senat and the Deputy Chamber, legal disputes of a constitutional nature between public authorities

We shall see to what extent the Parliament will take into consideration the Courts opinions. It is to be noted that one of the solution rendered by the Court in a previous decision[47] has been inserted in the constitutional provisions, the constitutional norm prescribing that the President of Romania has not only the power to award decorations and titles of honor, but also to withdraw it.

Conclusions

The present study has been oriented on the revealing of creative potential of the constitutional jurisdictions case-law, especially in what concerns their possibility of intervening on the normative content of the Basic Law. The importance of the task performed by the constitutional courts is undeniable and the fact that the have a positive influence on the constitutional provisions should consolidate their authority in the State's institutional architecture. This potentially quasi-legislative

[45] According to Article 32 paragraph 5 of the constitutiona, tuition at all levels is conducted in public, private, or confessional schools, according to the law.

[46] published in the Official Gazzette of Romania, no.440 of 23rd of June 2011.

[47] Decision no.88 of the 20th of January 2009.

power does not interfere with the sovereign power of the Parliaments or other similar legislative bodies to elaborate normative acts. That's because one of the most important goals of constitutional courts is to ensure the balance among the state's legislative, executive and judicial authorities. On the contrary, it has softens the conflicts and stimulates the fruitful collaboration among the states' authorities.

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