

*Message of the President of the Constitutional Court of Romania,
Mr. Marian ENACHE,
addressed at the launching conference of the
Forum of Constitutional Courts of the Balkan Region,
27 October 2023, Bulgaria, Sofia,
by Judge Elena-Simina TĂNĂSESCU, as observer*

Experience of the Constitutional Court of Romania in ensuring citizens' access to constitutional justice

- Historic perspective

Judicial review in Romania started as early as 1911 – through the ruling of the Tribunal of the commune of Bucharest in the now famous case of the “tramways of Bucharest”¹ – and it has been performed as a diffuse, incidental and repressive control of constitutionality of laws, but with the advantage that it allowed for the direct access of citizens to the constitutional justice. Indeed, back then the ordinary judge was also the constitutional judge, the access of the citizens to the constitutional justice was not filtered, although the court rulings had legal effects only *inter partes litigantes*. However, since those times, judicial review evolved a lot, both worldwide and in Romania, and nowadays the constitutionality of laws is verified within a different setting.

- Contemporary control of constitutionality of laws

Established in 1991 and based on the European model of judicial review, the Constitutional Court of Romania gathered a lot of experience in the more than three decades of existence. In 2003, a revision of the Romanian Fundamental Law

¹ Gaston 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 », *Revue de Droit Public et de science politique en France et à l'étranger*, tome XIX (1912), p. 140

strengthened the role of the Constitutional Court as guarantor of the supremacy of the Constitution, giving it new powers.

Thus, the Constitutional Court:

- decides on the constitutionality of laws, prior to their promulgation, and, *ex officio*, on initiatives to revise the Constitution;
- decides on the constitutionality of international treaties or other agreements;
- decides on the constitutionality of Parliament's standing orders;
- decides on preliminary questions of constitutionality regarding laws and delegated legislation, raised before courts of law or commercial arbitration or directly by the Ombudsman;
- resolves legal conflicts of constitutional nature between public authorities;
- ensures compliance with the procedure for the election of the President of Romania and confirm the results of the suffrage;
- takes note of the existence of circumstances justifying the interim in the office of President of Romania and communicates them to Parliament and Government;
- gives an advisory opinion on the proposal to suspend the President of Romania;
- ensures compliance with the procedure for the organization and conduct of the referendum and confirm its results;
- verifies that the conditions for citizens' exercise of legislative initiative are met;
- decides on appeals concerning the constitutionality of a political party;

In numerous decisions, the Court has rightly specified its role as a 'negative legislator', pointing out that it cannot replace Parliament for regulatory omissions or in order to amend a legal provision challenged before it².

² Decision No 997/2008, published in the Official Gazette of Romania, Part I, No 774 of 18 November 2008; Decision No 448/2013, published in the Official Gazette of Romania, Part I, No 5 of 7 January 2014.

In relation to the revision of the Constitution, the Constitutional Court shall decide *ex officio* both on the initiatives to revise the Constitution and on the revision law after its adoption by the Parliament, but not after the referendum validating the revision.

The Romanian constitution regulates two types of constitutionality review, *a priori* and *a posteriori*, a beneficial option if we take into account the fact that “in the case of *a priori* control, the judge uses the spectacles of smoke, but in the case of a *posteriori* he uses the microscope”³ – that is to say that prior review is general and abstract, whereas the posterior review is concrete and more thorough.

- A posteriori control of the constitutionality of laws

However, of all the powers of the Constitutional Court the most relevant one for the topic of the today discussion – namely the access of citizens to the constitutional justice – remains the resolution of preliminary questions of constitutionality. As it is well-known, the specificity of the *a posteriori* control consists of the advantage that it allows the review of a law from the point of view of its potential unconstitutionality after its adoption, that is after its enforcement, when constitutionality issues appear more evidently. This means that citizens who may observe potential infringements to their fundamental rights address such issues to the Constitutional Court. Nevertheless, the access of citizens to the constitutional justice is not direct, as it may be filtered by courts of law or of commercial arbitration, or indeed, by the Ombudsman, the only public authorities which may refer preliminary questions of constitutionality to the Constitutional Court. But this indirect access allows plaintiffs to present their claims directly in front of constitutional judges and may end-up with an invalidation of the concerned law that bears *erga omnes* legal effects.

³ I. Muraru, M. Constantinescu, *Constitutional Court of Romania*, Albatros Publishing House, Bucharest, 1997, p. 92.

While exercising this specific power, the Court shall dismiss as inadmissible any objection of unconstitutionality aimed solely at the interpretation or application of a law or ordinance, since, according to the Constitution, this task falls exclusively within the jurisdiction of ordinary courts. Admittedly, this does not mean that, in the exercise of its own jurisdiction, the Court does not interpret the legal norms on which it is ruling, given that, in order to determine whether or not a legal provision is constitutional, the exact meaning of that legal provision must be determined and compared with the provisions of the Fundamental Law. Moreover, some of the decisions of the Constitutional Court – the interpretative ones – find legal provisions to be unconstitutional only to the extent that they may present a certain meaning, which is found contrary to the Constitution, while other meanings may be constitutional, and this necessarily implies a process of interpretation of the examined rules⁴.

By exercising the incidental and concrete control which is the preliminary question of constitutionality, the Constitutional Court performs a function of protector of fundamental rights and freedoms of citizens in addition to its role of guarantor of the supremacy of the Constitution. Therefore, the preliminary question of constitutionality is a constitutional guarantee of the citizen for the protection of his rights and freedoms in a legal dispute.

- Statistics

Statistics⁵ are always useful to illustrate this feature. Thus, since its creation and up until October 2023, the Constitutional Court has dealt with a total of 58.559 referrals, which resulted in a total of 23.132 decisions and rulings, 922 of which were admission decisions and 3 were (negative) advisory opinions for the proposal to suspend the President of Romania.

⁴ Decision No 660/2007, published in the Official Gazette of Romania, Part I, No 525 of 2 August 2007; Decision No 818/2008, published in the Official Gazette of Romania, Part I, No 537 of 16 July 2008.

⁵ Source: <https://www.ccr.ro>.

Referring only to the main task of the Court, out of the total number of decisions and rulings:

- 665 referrals were made in the framework of the constitutional review of laws before promulgation (*a priori* review),
- 11 examinations related to initiatives to revise the Constitution and other 7 referrals related to the control of the fulfilment of the conditions for the exercise of the legislative initiative by the citizens,
- 58 referrals related to the constitutional review of Parliament's regulations,
- 57.141 preliminary questions of constitutionality (*a posteriori* review) were raised before ordinary courts or directly by the Ombudsman,
- 55 requests aimed at resolving the legal conflict of a constitutional nature between public authorities, and
- 29 referrals aimed at following the procedure for organizing and conducting the referendum.

Out of the total number of complaints of unconstitutionality of laws before promulgation (665), about **52.76 % were admitted**, and of the total complaints regarding the unconstitutionality of parliamentary regulations (58), **44.23 % were admitted** in whole or in part. Out of the total preliminary questions of constitutionality, only **2.81 % of the cases** ended-up with **admission** solutions. In absolute numbers this translates into **617 decisions** through which the Court declared laws or ordinances, or only provisions contained therein, to be unconstitutional out of a total of 21.963 decisions rendered via *a posteriori* review⁶.

⁶ Source: <https://www.ccr.ro>.

- Outcome of the control of constitutionality performed by the Constitutional Court

Finally, we cannot finalize this statement without saying a few words about the **effects of the decisions of the Constitutional Court**, enshrined in Article 147(4) of the Constitution: *“Decisions of the Constitutional Court shall be published in the Official Gazette of Romania. From the date of publication, decisions are generally binding and have power only for the future.* According to the Constitutional Court, “the decision finding an unconstitutionality is part of the normative legal order, by its effect the unconstitutional provision ceases to apply for the future”⁷. I would point out here that, in case it is admitted, in a decision ruling on a plea of unconstitutionality presented by a citizen, “the Court shall also rule on the constitutionality of other provisions of the contested act, from which, necessarily and obviously, the provisions referred to in the referral cannot be dissociated”⁸, which is an illustration of the possibility the Constitutional Court has to exceed the strict limits of the referral received.

Also relevant for the topic debated here is the provision of Article 147(1) of the Constitution⁹. This establishes, as regards laws and ordinances in force but found to be unconstitutional, that they *“shall cease their legal effects 45 days after the publication of the decision of the Constitutional Court if, within this period, the Parliament or the Government, as the case may be, do not agree the unconstitutional provisions with the provisions of the Constitution. During that period, the provisions found to be unconstitutional shall be automatically suspended.”*

Of course, all these elements raise the issue of the implementation of the Constitutional Court’s decisions by Parliament and Government. In the case of a *posteriori* review, failure to comply with the obligation to agree on texts declared

⁷ Decision No 847/2008, published in the Official Gazette of Romania, Part I, No 605 of 14 August 2008.

⁸ Article 31(2) of Law No 47/1992.

⁹ The provision is repeated in Article 31(3) of Law No 47/1992, republished.

unconstitutional gives to the decision of the Constitutional Court the effect of repealing the text in question, which shall be void of legal effects for the future.

As stated by the Romanian legal doctrine, the legislator's readiness to comply with the Constitutional Court's decision "was and is closely related to the loyal constitutional behavior of public authorities"¹⁰. The Constitutional Court cannot compel public authorities to legislate or replace legal rules found unconstitutional, in the sense of amending or supplementing the legal norm subject to constitutional review, since, in all cases in which it decides on the normative acts that are subject to referrals, those provisions are reviewed by the Court exclusively by reference to the provisions or principles of the Constitution. A part from not being able to amend or supplement the legal texts criticized, the Constitutional Court cannot interpret and apply such legal texts to the concrete cases in front of ordinary courts, thus replacing them in solving the concrete claims of plaintiffs or defendants. Also, it shall not take the place of the High Court of Cassation and Justice, which "ensures the uniform interpretation and application of the law by the other courts, according to its jurisdiction". Finally, the Constitutional Court cannot proceed to the comparison of the legal norms among them and to report the conclusion that would result from this comparison to constitutional texts and principles. The Constitutional Court has only the power to review the compliance of laws with the Constitution and draw attention to public authorities in case it identifies infringements to constitutional provisions or principles.

- Conclusion

In conclusion, we would like to point out that the Constitutional Court is merely an arbitrator of disputes concerning the interpretation of our Constitution,

¹⁰ I. Muraru, Tănăsescu (coord.), op. cit., p. 1.420.

and must remain independent of any public authority, subject only to the Constitution and its law of organization and functioning.