

The Binding Aspect of the Decisions of the Constitutional Court and Their Effect

Gabriela NEMȚOI¹

¹ Associate Professor PhD, “Ștefan cel Mare” University of Suceava, Faculty of Law and Administrative Sciences, Suceava, Romania, gabriela.nemtoi@fdsa.usv.ro

Abstract: *The Constitutional Court, as an authoritative body regarding the application of constitutional control, issues decisions that would take the place of the segment of the legislative text that has been proven to be illegal. In this context, the decisions have the character of law and as such should be applied in the context of admitting a notification of unconstitutionality. The decisions and rulings of the Constitutional Court are generally binding and have force only for the future. Consequently, all public authorities are obliged to respect the decisions and rulings of the Constitutional Court. At the same time, according to the Court's jurisprudence, the power of res judicata that accompanies the jurisdictional acts, therefore also the decisions of the Constitutional Court, is attached not only to the device, but also to the considerations on which it is based. Consequently, both the Parliament and the Government, respectively the public authorities and institutions must fully respect both the considerations and their devices.*

The mandatoryness of the decisions of the Constitutional Court is a subject of real topicality, a fact that incites various analyses to elucidate the necessity of this characteristic. In this sense, this article seeks to present the overall legal framework through which the decisions of the Constitutional Court have the character of law.

Keywords: *Constitutional Court, constitutional decisions, exceptions of unconstitutionality, constitutional guarantor*

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I. Introduction

Ensuring the stability of the constitutional text in a state is achieved by connecting several factors, namely, the procedure for revising the Constitution when appropriate, the application of constitutional texts on the legislative framework, including by the courts, establishing a major influence through the decisions of the Constitutional Court through the issued decisions, etc.

In this context, as can be seen, the Constitutional Court has a major influence in the sense that it is the instrument through which the aspect of guarantee and balance between the powers of the state is ensured. Constitutional Court according to art. 147 of the Romanian Constitution has the authority to state that *“(1) The provisions of the laws and ordinances in force, as well as those of the regulations, found to be unconstitutional, cease their legal effects in 45 days after the publication of the decision of the Constitutional Court if, in this interval, the Parliament or the Government, as the case may be, do not reconcile the unconstitutional provisions with the provisions of the Constitution. During this period, the provisions found to be unconstitutional are suspended by law. (2) In cases of unconstitutionality concerning laws, before their promulgation, the Parliament is obliged to re-examine the respective provisions for their agreement with the decision of the Constitutional Court. (3) If the constitutionality of the treaty or international agreement has been ascertained according to the article 146 letter b), it cannot be the subject of an exception of unconstitutionality. The treaty or international agreement found to be unconstitutional cannot be ratified. (4) The decisions of the Constitutional Court are published in the Official Gazette of Romania. From the date of publication, the decisions are generally binding and have power only for the future”*, thus maintaining the legality of normative acts by implementing the decisions.

In this presentation, we will analyse the role and influence of constitutional decisions from the point of view of their binding nature, competence that is granted precisely by the presence of a constitutional text.

II. The binding nature of the decisions of the Constitutional Court

The issue of the binding character of the decisions of the Constitutional Court is the subject of extensive debates in the specialized literature, but also of some limitations that come from the courts. In the form prior to the 2003 revision, the Romanian Constitution stipulated that the decisions of the Constitutional Court are binding and have power only for the future. This constitutional provision has been interpreted differently in the doctrine and in the practice of the courts. Thus, even the supreme

court considered that the decisions of the Constitutional Court produce legal effects only *inter partes litigantes*. The reason from which this concept starts is the pre-war system of control of the constitutionality of laws, which was a control carried out by the High Court of Cassation and Justice, and its decisions produced effects only for the parties in the process. This point of view was obviously contrary to the provisions of the new Constitution of Romania, which saw in the control of constitutionality a matter of public order, the decisions of the Constitutional Court going to produce effects *erga omnes*.

Thus, the jurisprudence of the Constitutional Court demonstrated the necessity of the 2003 Constitution Review, where the new constitutional text provided that: “Decisions of the Constitutional Court are published in the Official Gazette of Romania. From the date of publication, the decisions are generally binding and have force only for the future”. Through this express proclamation of the general binding nature of the Court’s decisions, any controversy regarding the effects of the constitutional contentious court’s decisions to admit the exceptions of unconstitutionality was put to an end.

Thus, the seat of the matter regarding the decisions of the Constitutional Court is constituted by the provisions of art. 147 of the Constitution. Within this constitutional text, only para. 4 has a general applicability, in the sense that it finds its application in relation to all decisions of the Court pronounced in the exercise of the powers provided by the Constitution and Law no. 47/1992 on the organization and functioning of the Constitutional Court. Specifically, this paragraph mentions that “Decisions of the Constitutional Court are published in the Official Gazette of Romania. From the date of publication, the decisions are generally binding and have force only for the future”.

Moreover, art. 147 para. (1) of the Constitution establishes, regarding the laws and ordinances in force, found to be unconstitutional, that they “cease their legal effects in 45 days after the publication of the decision of the Constitutional Court if, during this interval, the Parliament or the Government, as the case may be, do not reconcile the non-constitutional provisions with the provisions of the Constitution. During this period, the provisions found to be unconstitutional are suspended by law”. The constitutional provision is resumed, at the legal level, by art. 31 para. (3) of Law no. 47/1992, and art. 147 para. (4) of the Constitution, related to para. (1) of the same article, by art. 31 para. (1) from the same law. In conclusion, it is understood that neither the Constitution nor the Law no. 47/1992 expressly regulates the situation of laws or ordinances that are no longer in

force declared unconstitutional, which means that the Constitutional Court has the role of interpreting the provisions of art. 147 para. (4) of the Constitution regarding the effects of its decisions.

The issue of law in question manifests itself in the device that mentions the terminology regarding the decisions of the Constitutional Court as “generally binding”. In this sense, the idea that the decision would be “generally binding” is also found in the considerations of decisions no. 1 of January 17, 1995 [1]; decision no. 414 of April 14, 2010[2]; decision no. 392 of June 6, 2017[3], motivation that somewhat justifies the mandatory nature provided in art. 147 para. (4) of the Constitution.

Analysing the terminology regarding the decisions of the Constitutional Court of “generally binding and have power only for the future”[4], we find that we are in some error with art. 36 of own Law no. 47/1992 on the organization and operation of the Constitutional Court.

In accordance with art. 147 of the Constitution if we were to concretely synthesize only para. 4 of the mentioned article considers, in its entirety, only the decisions by which the Constitutional Court pronounces on the unconstitutionality of some normative acts. Therefore, only these decisions, according to the Constitution, are “generally binding”, and not all the decisions/acts that the Constitutional Court gives in the exercise of the powers that art. 146 of the Constitution confers them, which are much more, as is the attribution from letter e), in the sense that: “resolves legal conflicts of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister or the President of the Superior Council of the Magistracy.”

In the hypothetical situation in which the constituent legislator would have wanted all acts issued by the Constitutional Court to be “generally binding”, para. (4) of art. 147 should have been placed within art. 146 of the Constitution, immediately after listing the powers of the Constitutional Court, and not in art. 147 in which it refers exclusively to the decisions by which the Court pronounces on the unconstitutionality of some normative acts. Therefore, only these latter decisions are “generally binding” and this quality of theirs is even of constitutional origin, and not just legal, in the sense that only the violation of these decisions is equivalent to a violation of the Constitution.

On the other hand, Law no. 47/1992, in the application of the Constitution, specifies the legal regime of the acts that the Constitutional Court issues in the exercise of its powers. We mention as follows: art. 11 para. (3) from Law no. 47/1992, according to which: “*Decisions, rulings and opinions of the Constitutional Court are published in the Official Gazette of Romania,*

Part I. Decisions and rulings of the Constitutional Court are generally binding and have force only for the future?

We underline the fact that the mentioned text extends, beyond the Constitution, the “generally binding” nature of the Constitutional Court’s decisions on the other categories of acts that the Constitutional Court issues in the exercise of its powers, with the exception of opinions, taking the wording from art. 147 para. (4) of the Constitution.

Moreover, the provisions of the Constitution, art. 31 para. (1) from Law no. 47/1992 provides that: “(1) *The decision establishing the unconstitutionality of a law or ordinance or a provision of a law or an ordinance in force is final and binding.*”, reinforces the importance and broad effect attributed to constitutional decisions, recognized by art. 147 Constitution of Romania.

Instead, art. 36 of Law no. 47/1992, which regulates the matter of resolving the legal conflict of a constitutional nature, launches a wording with a different content without strictly mentioning the mandatory character: “*The decision by which the legal conflict of a constitutional nature is resolved is final and is communicated to the author of the notification, as well as to the parties in conflict, before its publication in the Official Gazette of Romania, Part P*”. The differentiated aspect can be noted, namely that in one situation the decisions are general and binding and in another sense the decisions are definitive, as such the effect should be perceived differently.

Article 36 of Law no. 47/1992 is, obviously, a special, derogatory text in relation to art. 11 para. (3), which is a general text, and expressly and distinctly regulates the legal regime of such a decision.

The contrary interpretation of art. 36 of Law no. 47/1992 could be supplemented with the provisions of art. 11 para. (3) from the same law, because, anyway, all the decisions of the Constitutional Court are final, not being subject to any appeal. In other words, even if there was no art. 36 of the law, these decisions would still have been final anyway, because all the decisions of the Constitutional Court are final.

Moreover, the exclusion of the text regarding art. 11 para. (3) of the law, i.e. only then would the decisions have been “generally binding”. Therefore, the reason for the existence of the text, as drafted, cannot be other than to remove the “generally binding” character in the case of this category of decisions, limiting these decisions to the definitive character.

It follows that, according to the Constitution and according to art. 36 of Law no. 47/1992, in resolving a legal conflict of a constitutional nature, the Constitutional Court cannot pronounce a decision neither “generally binding” nor even “mandatory”, but only a final decision, on the

grounds that final decisions can no longer be appealed against other way of attack.

In conclusion, in the application of these analysed constitutional and legal provisions, the decisions of the Constitutional Court, which resolve legal conflicts of a constitutional nature, are generally not binding, in the light of the special rule established by art. 36 of Law no. 47/1992, which expressly states only that such a decision is final, without mentioning that it is also binding. And art. 36 of Law no. 47/1992 is the text directly applicable to the Constitutional Court, while art. 147 para. (4) cited by the Constitutional Court in its decision is obviously not applicable, because the decision was not given regarding the unconstitutionality of a normative act.

In the jurisprudence of the Constitutional Court, there are examples of decisions that use both terminologies, both “generally binding” and “definitive”, but these, according to the previously mentioned legislative framework, present an aspect of error because both phrases cannot be applied. In this regard, we recall Decision no. 358/2018, which ends with the phrase “Definitive and generally binding”. The question that arises in this regard is how this error can be corrected and what is the procedure to apply. The one who is able to correct the error is the Constitutional Court, which in accordance with art. 36 of Law no. 47/1992, must draft the decision according to which the decision is final, limiting itself only to the definitive mention in the final decision. This error must be corrected because the erroneous aspect can generate new legal conflicts.

If it were considered that it was not a “material error”, the interested party can refer the Constitutional Court with a request based on the provisions of art. 443 of the Civil Procedure Code, in conjunction with art. 14 para. (1) from Law no. 47/1992, to clarify this issue, on the one hand, in relation to the mention that the decision is “generally binding”, on the other hand, and in relation to the provisions of art. 36 of Law no. 47/1992 and of art. 147 para. (4), from which it follows that such a decision is final, but not binding?

We conclude by maintaining the idea that the “generally binding” force of the Constitutional Court Decision no. 358/2018 is not constitutional, but is only the result of a serious error, contradicting both the provisions of art. 147 para. (4) of the Constitution, invoked by the Constitutional Court, and which were not applicable in the case, as well as in relation to art. 36 of Law no. 47/1992, special rule, which enshrines only the definitive nature of such a decision.

In this situation, the Constitutional Court is able to refer ex officio and order the correction of this serious and obvious error in Decision no.

358/2018, or, the rectification should be made upon notification of the interested party, the latter having the attribution to clarify the disposition of the decision, in the sense that the decision cannot be “generally binding”.

III. Conclusions

In essence, the decision of the Constitutional Court is a judicial decision; in accordance with the provisions of art. 261 para. (1) point 5 of the Civil Procedure Code - the common framework with which, procedurally, Law no. 47/1992 regarding the organization and functioning of the Constitutional Court¹. The considerations of the decision must show “the factual and legal reasons that formed the conviction of the court, as well as those for which the requests of the parties were removed. If in matters of common law, the decision can be challenged in ordinary or extraordinary, comparative ways, the constitutional decision is by the legal statute, i.e. art. 147 of the Constitution, general and mandatory or definitive.

The justification of the constitutional decision is intended to substantiate the pronounced solution, to correct the normative system, by eliminating texts and normative acts contrary to the Constitution, and to limit the perpetuation of the vice of unconstitutionality by issuing normative acts that are, to the same extent, for the same unconstitutional reasons.

The action itself is defined as a consequence of the role of the Constitutional Court as the guarantor of the supremacy of the Constitution, established by the Fundamental Law, a role that could not be fully realized if the mandatory value of the Court’s interpretation of texts and concepts of the Fundamental Law was not recognized, the meaning identified by it to the will of the constituent legislator.

References

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- Decision no. 392 of June 6, 2017, published in the Official Gazette of Romania, Part I, no. 504 of June 30, 2017, para. 52.
- Law no. 47/1992 regarding the organization and functioning of the Constitutional Court Published in Official Gazette no. 187 of August 7, 1997.

¹ Law no. 47/1992 regarding the organization and functioning of the Constitutional Court Published in Official Gazette no. 187 of August 7, 1997.