

# THE CONTEST AMONG THE DECISIONS OF THE ROMANIAN CONSTITUTIONAL COURT AND THE DECISIONS OF THE ROMANIAN HIGH COURT OF CASSATION AND JUSTICE IN THE RECOURSE IN THE INTEREST OF LAW

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**ABSTRACT:** *This study raises a really important matter for the real functioning of the Romanian rule of law. Which of these two institutions - the Constitutional Court or the High Court of Cassation and Justice is called upon to solve a problem of law and the solution of which one can be applied in the practice of the courts?*

*The study is based on a specific case, the legal conflict that arose from the uneven application of the constitutional provisions, and not only but also from the poor drafting of the Romanian Constitution in what concerns the limitation of competences regarding certain fundamental institutions for the existence of the rule of law.*

**KEYWORDS:** *Constitutional Court of Romania, High Court of Cassation and Justice, Recourse in the interest of law, Criminal Code of Romania, insult, slander, proof of truthfulness*

**JEL CLASSIFICATION:** *K10, K40*

At its meeting on October the 18<sup>th</sup> 2010, the High Court of Cassation and Justice of Romania, organized into United Sections, pronounced the Decision no. 8/2010 by which it grants the recourse in the interest of law<sup>1</sup> promoted by the general prosecutor of the Public Prosecutor's Office attached to the High Court of Cassation and Justice and the notification of the Administrative Board of the Prosecutor's Office attached to the Bucharest Court of Appeal, noting that the criminalization norms of the insult, slander and the proof of truthfulness have been abolished once for all by the provisions of Article I, section 56 of the Law no. 278/2006<sup>2</sup>, even if the latter repealing provisions were declared unconstitutional by the Decision no. 62 from January 18<sup>th</sup>, 2007 of the Constitutional

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<sup>1</sup> The recourse in the interest of law has been regulated for the first time in our system of law by the Law for the establishment of the Court of Cassation and Justice of January 24<sup>th</sup>, 1861 and in criminal law it was introduced by the Criminal Procedure Code in 1936.

<sup>2</sup> Law no. 278/2006 for the amending and supplementing of the Criminal Code and for the amending and supplementing of other laws, it was published in the Official Gazette of Romania, Part I, no. 601 of July 12<sup>th</sup>, 2006.

Court of Romania. As such, the High Court of Cassation and Justice has determined that the norms of incrimination for insult and slander, contained in the Article 205 and Article 206 of the Criminal Code and also in the Article 207 of the Criminal Code regarding the proof of truthfulness, are not in force.

Even though the Decision no. 62/2007 of the Constitutional Court was published in the Official Gazette of Romania<sup>3</sup>, the Decision no. 8/2010 of the High Court of Cassation and Justice hasn't been published yet in the Official Gazette. These two decisions, by their content that relates to the solving of certain legal problems are found in an obvious collision.

In assessing the issue of law submitted to discussion in this study there are also issues to be noted like the following: in the Article 147 paragraph 4 of the Romanian revised Constitution<sup>4</sup>, it is stated that the Constitutional Court decisions are published in the Official Gazette of Romania, date when they start to be generally binding only for the future; in the Article 126 paragraph 3 of the revised Constitution, it states that the High Court of Cassation and Justice provides under its jurisdiction the interpretation and the uniform application of law by other courts, and according to Article 414<sup>5</sup> paragraph 2 of the Romanian Criminal Procedure Code, decisions issued by the United Sections of the High Court of Cassation and Justice shall be published in the Official Gazette of Romania, Part I, (by Law no. 202/2010 the publication of the decision of the High Court of Cassation and Justice was considered unnecessary on the Internet so eventually the provision was removed)<sup>5</sup>. Therefore, maintaining the legal symmetry stemming from the Constitution, starting with its publication in the Official Gazette of Romania, the decision of the High Court of Cassation and Justice, becomes binding in order to ensure the unitary interpretation and application of criminal laws and criminal procedure laws by all courts.

Romania's Constitutional Court held in the considerations of the Decision no. 62 of 18<sup>th</sup> January 2007<sup>6</sup>, after examining the constitutionality of the repealed Article 205 (insult), 206 (slender) and 207 (proof of truthfulness) of the Criminal Code through the provisions of Article I section 56 of Law no. 278/2006 and in the light of the provisions regarding freedom of expression contained in the Article 30 paragraph 1 of the Romanian Constitution ("freedom regarding the expression of thoughts, opinions or beliefs and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable"), Article 30 paragraph 6 of the Romanian Constitution (freedom of expression may not harm the dignity, honor, privacy of the person and neither the right to the person's own image"), Article 10, paragraph 2 from the Convention for the protection of human rights and fundamental freedoms ("the exercise of this freedom since it carries with it duties and responsibilities may be subject to such

<sup>3</sup> Decision no. 62 of January 18th, 2007 of the Constitutional Court was published in the Official Gazette of Romania, Part I, no. 104 of February 12th, 2007.

<sup>4</sup> Constitution came into force on December 8th 1991, it was revised by the Law no. 429/2003 then it was republished in the Official Gazette of Romania, Part I, no. 767 of October 31st, 2003.

<sup>5</sup> Article 414<sup>5</sup> paragraph 2 amended by Article I, section 200 of the Law no. 356/2006, published in the Official Gazette of Romania, Part I, no. 677 of August 7th, 2006; the provisions regarding the recourse in the interest of law were amended by Law no. 202/2010 published in the Official Gazette of Romania, Part I, no. 714 of October 26th, 2010.

<sup>6</sup> Like any decision of the court, keeping its jurisdictional dimension, the Constitutional Court decisions have three parts – introductory statement (preamble), grounds (motivation) and disposition (the decision itself).

formalities, conditions, restrictions or penalties as are prescribed by law, and are necessary in a democratic society for [...] the protection of the reputation or rights of others [...], as well as in the Article 19 paragraph 3 from the International Covenant on civil and political rights (“the exercise of these freedoms, carries with it special duties and responsibilities and that it may be subject to certain restrictions which must be expressly provided by law, taking into account the rights or reputation of others”) that there is no incompatibility between the principle of the freedom of expression and the criminalization of insult and slander as criminal offenses. In other words, the imperative constitutional dimension does not claim that these facts cannot coexist along with other acts considered as crimes in the criminal law<sup>7</sup>.

But perhaps what was the most important to be noted from the considerations of this decision was that the same Constitutional Court acknowledged its competence (jurisdiction) according to Article 146 letter d of the Constitution in what concerns the verification of the constitutionality of certain repealing legal provisions and that, in case they are found unconstitutional, they cease their legal effects according to Article 147 paragraph 1 of the Constitution and *the legal provisions that formed the subject of repeal continues to produce legal effect*. By this statement, the Constitutional Court clearly re-enforces some provisions repealed with future character, incriminates certain deeds as crimes (according to Article 73, paragraph 2, letter h and Article 23, it could be incriminated only by law), establishes penalties (Article 23, paragraph 12), violates its own Act of organization and operation no. 47/1992 (Article 29, paragraph 1 states that the object of the objection to unconstitutionality is formed by legal provisions in force, which cannot be said when implicitly it is checked the constitutionality of incrimination regarding insult and slander).

Furthermore, the Constitutional Court by repeated decisions has assigned for its own decisions (*in integrum*) an absolute feature. Thus, “the claim preclusion accompanying the jurisdictional acts and also the decisions of the Constitutional Court is attached not only to the disposition but also to the grounds that support it. Consequently, both Parliament and the Government, the public authorities and institutions (*quod eram demonstrandum* - The Constitutional Court is the fourth power in State, if not a superpower) will fully comply with both considerations and dispositions of the decision”<sup>8</sup>. If the Constitutional Court favors such an interpretation<sup>9</sup>, the doctrine is rightly divided<sup>10</sup>, just as the

<sup>7</sup> Insult and slander are acknowledged in other countries as crimes, for example, Portugal (Article 180-189 of the Criminal Code), Spain (Article 205-216 of the Criminal Code), Germany (§ 90, § 185-190, § 193-194, § 19, 200 of the Criminal Code), Italy (Article 594-595 of the Criminal Code) Norway (Chapter 23, § 246-248 of the Criminal Code) 146 Bulgaria -148 of the Criminal Code) Denmark (Article 266 -267 of the Criminal Code).

<sup>8</sup> Decision no. 414 of April 14th, 2010 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 291 of May 4th, 2010.

<sup>9</sup> The Decision of the Plenum of the Constitutional Court no. 1/1995 published in Official Gazette no. 16 of January 26th, 1995; Decision no. 1415 of November 4th, 2009 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 796 of November 23rd, 2009; Decision no. 415 of April 14th, 2010 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 294 of May 5th, 2010, Decision no. 1018 of July 19th 2010 of the Constitutional Court, published in the Official Gazette no. 511 of July 22nd, 2010.

<sup>10</sup> See Marieta Safta, Karoly Benke “Obligativitatea considerentelor Deciziilor Curții Constituționale, in the Journal “Dreptul” no. 9/2010, p. 28-55, Elena Simina Tănăsescu “Comentarii la Decizia Curții Constituționale nr. 62/2007, in “Curierul Judiciar” no. 4/2007, p. 12.

jurisprudence of the courts has been, it remains the same, either before or after the adoption of the Decision no. 8/2010<sup>11</sup> by the High Court of Cassation and Justice.

Undoubtedly the Constitutional Court is not kept away from criticism, especially since now the Court turns into a legislator (evidently their decisions even if not acknowledged have a repealing role) and moreover according to Article 147 it assumes a role that practically turns the Court into a fourth state power, passes with nonchalance over the provisions of the Article 62 paragraph 3 of Law no. 24/2000 regarding the technical rules for drafting the acts of legislation which stipulates “the repeal of a provision or a normative act, has a final feature” (but they say that the constitutional repeal doesn’t exist, therefore it shouldn’t be confused with the repeal). But once the legal source of the Constitutional Court’s decision is found right in the fundamental document, (it was first published), it is generally binding and produces legal effects “*erga omnes*” and having power for the future, the compliance is mandatory not only for the Parliament, Government but for any other authority or public institution. Therefore, the courts, including the High Court of Cassation and Justice, had no choice but to comply with the constitutional provisions contained in Article 147. But our whole system of law must conform to constitutional norms also through identity of reason and the decisions of the High Court of Cassation and Justice pronounced in this type of recourse must be in consonance with the Constitutional provisions. The High Court of Cassation and Justice has no power to issue normative legal acts so it must limit itself to only apply and interpret the law.

Beyond the fact that the Decision no. 8/2010 was not published in the Official Gazette of Romania and therefore cannot produce legal effects, the High Court of Cassation and Justice, did nothing more than to stir up confusion, thus losing its only task in this area, the uniform feature of interpretation.

Furthermore, after the decision of the Constitutional Court had been published, the Supreme Court lost its material competence to examine this matter of law as accepting this argument would implicitly amount to a constitutional control over the constitutional decision. In reality, the High Court of Cassation and Justice has exceeded its duties that needed to be performed only within the limits set by the Constitution.

There is no doubt that the decisions of the Constitutional Court, besides the decisions of the High Court of Cassation and Justice delivered in the recourse in the interest of law, have their source in the constitutional rule where they find their legal basis (Article 147, paragraph 4 and Article 126 paragraph 3).

But on the other hand it is just as true that any legal document, normative or individual is subject to the principle of compliance with the constitutional rule (Article 1, paragraph 5, of the Constitution “in Romania, the observance of the Constitution as well as its supremacy and the laws is compulsory”) and therefore the legal instrument through which the High Court of Cassation and Justice expresses itself in the interpretation and application of the law in all the courts must conform to the fundamental act. Interpretation and enforcement of the law is exercised by the judge taking into account the principle of observing the supremacy of the Constitution.

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<sup>11</sup> Tîrgu Mures Court - Criminal Sentence no. 219 of February 22nd, 2011 (unpublished); Tîrgu Mureş Court - Criminal Sentence no. 221 of February 23rd, 2011.

As such, once a decision of the Constitutional Court is published in the Official Gazette, starting with the publication date it becomes generally binding, enjoys absolute authority of claim preclusion (in case of admission) or relative (in case of rejection) it is final and shall apply for the future. Analyzing the features of the Constitutional Court decision, it appears to us unquestionable its primacy in relationship to the decision of the High Court of Cassation and Justice. Not to mention that the Decision no. 8/2010 of the High Court of Cassation and Justice, hasn't been published yet in the Official Gazette (of course, the appearance of the decision on the Internet cannot produce the same effects as it would produce if it were published in the Official Gazette).

From the analysis of the features regarding the constitutional decision it follows:

A. The feature generally binding<sup>12</sup> that implies at least five meanings:

1. the legislative provision which has been declared unconstitutional cannot be applied in the future thus ceasing to hold future legal effects<sup>13</sup>.

2. general – meaning it addresses to all legal issues - *erga omnes* – to public authorities, institutions, legal entities and natural persons, without exception, who have a duty to comply unreservedly and therefore it produces legal effects for all courts.

3. binding – its mandatory feature is the consequence of recognizing the principle of the hierarchical nature of the legal rules and results from the essence of the constitutional control that guarantees the supremacy of the Constitution in a state of law.

4. the decision as a whole (preamble, grounds, disposition) has a binding feature.

5. Constitutional jurisprudence - the decision for admission presents at least formally the feature of a source of law. Thus, the effect of decisions for admission regarding the unconstitutionality of a law, ordinance, and provision of a law or ordinance is “similar to the effect of repeal,” although in the Constitution there is no provision in this regard *expressis verbis*. Consequently the entire decision (including the grounds) has this character of formal source of law.

B. Claim preclusion (*res judicata pro veritate habetur*). The decision pronounced upon an objection to unconstitutionality has the value of a judicial act, endowed with claim preclusion<sup>14</sup>. In case of a decision for admission, claim preclusion has value *erga omnes*, and in case of a decision for rejection, it produces effects only to the parties in the lawsuit. Moreover, once the decision is seen as a whole, and the disposition “flows” reflecting the grounds, it is not surprising that the same Constitutional Court held that “*claim preclusion* accompanying judicial acts, not only have to be attached to the disposition, but also to the grounds that support it.”<sup>15</sup> Professor Ion Deleanu stated in his work “*Justiția Constituțională*” (Constitutional Justice) that the jurisprudence of the Constitutional Council as well as the French doctrine noted that the decisions that solve a matter of law enjoys claim preclusion as much as by disposition as by the grounds<sup>16</sup>.

<sup>12</sup> See Tudor Drăganu, “Efectele juridice ale deciziilor Curții Constituționale în lumina prevederilor Constituției revizuite” in the Journal of Public Law, no. 1/2004, p. 76 et seq.

<sup>13</sup> Decision no. 98 of April 5th 2001 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 256 of May 18th 2001.

<sup>14</sup> See Ion Deleanu, “*Justiția Constituțională*”, “Lumina Lex” Publishing House, Bucharest, 1995, p. 352.

<sup>15</sup> Decision no. 414 of April 14th 2010 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 291 of April 5th 2010.

<sup>16</sup> See Ion Deleanu, *op.cit.*, p. 349 (footnotes)

C. The final feature is revealed by the fact that the Constitutional Court decisions are not subject to any means of appeal.

D. Produce effects only for the future (*tempus regit actum*).

It is undeniable, from the above stated, that Decision no. 8/2010 of the United Sections of the High Court of Cassation and Justice has been issued with excessive power and this probably because there is no legal liability for the usurper of the Constitutional Court decisions.

Analyzing also the features of the decision pronounced by the High Court of Cassation and Justice in the recourse in the interest of law, we believe we can see the difference regarding the decision of the Constitutional Court, demonstrating in contest the primacy of the latter. Thus,

E. From the binding feature we conclude:

- According to Article 414<sup>5</sup> of the Criminal Procedure Code the decision produces legal effects, binding for all courts only starting with its publication in the Official Gazette of Romania, Part I. (Decision no. 8/2010 has never been published);

- The decisions cannot constitute sources of law not even formally as they do not give birth to legal norms, modify or extinguish legal rules, the decisions are pronounced only to ensure unitary interpretation and application of the law;

- It addresses only to the courts, lacking the general character specific to decisions of constitutional jurisdiction.

Moreover, in the history of the Constitutional Court there have been decisions which the courts have proved to be insubordinate (Decision no. 279/1997 of the Constitutional Court on the unconstitutionality of Article 149, paragraph 3 of the Criminal Procedure Code regarding the extension of remand, Decision no. 486/1997 of the Constitutional Court regarding the free access to justice)<sup>17</sup>.

Compared to the above statements we consider that the Decision no. 8/2010 issued by the High Court of Cassation and Justice on the recourse in the interest of the law is unconstitutional because it violates Article 1 paragraph 3 from the Romanian Constitution - "Romania is a state of law" and even more since nothing can cancel the fact that the Constitution itself guarantees the supremacy of fundamental act. The specific effect of the Constitutional Court decision facing the decision of the High Court of Cassation and Justice, may derive equally from the *res judicata* which the first enjoys (especially by *juris dictio* above all) from its "compulsory" feature and not least from the fact that the repealing rule was removed as unconstitutional and therefore "*quod nullum est, nullum producit effectum*." If the unlawful act doesn't produce legal effects any more, the unlawfully repealed act is brought back to life and re-enters the legal circuit. Article 62 paragraph 3 of Law no. 24/2000 in this case finds no application as in its content it relates to the technique of repealing and not to this type of "constitutional" repeal.

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<sup>17</sup> See Bianca Seleşan-Gutan "Excepția de neconstituționalitate", All Beck Publishing House, Bucharest, 2005, p. 211-212.