UDC/УДК 342.4(498)
ORIGINAL SCIENTIFIC ARTICLE / *ИЗВОРНИ НАУЧНИ РАД*

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ORIGINALISM, TEXTUALISM AND LIVING LAW IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

The legal norm is a rule of conduct, established by or recognized by the public power, the application of which is ensured by the legal conscience and, if it necessary, by the coercive force of that power, usually by the state. It is presumed to be in line with the Constitution, having attached a so-called presumption of constitutionality. The constitutional courts assess the constitutionality of the legal norms in relation to a standard of reference, namely the Constitution, the fundamental act of the state. The result of this review consists in upholding or reversing the presumption of constitutionality of the legal norm.

The Constitution is not meant to be an abstract instrument, but every constitutional concept has to be defined, structured and applied in the national framework. In order to guarantee the supremacy of the Constitution, any constitutional court has the uppermost task to determine the meaning of the constitutional norms and to establish its relation with the international agreements ratified by the state. In this endeavoring mission, the methods of interpretation of the Constitution play an essential role in constitutional adjudication. These methods can either valorize the original or actual meaning of the constitutional norm, or take into account a set of political, economic, social or cultural developments. The option for a certain method of interpretation or for a mix between two or more such methods determine a chain reaction in the legal life of the state. Such an option is a question of legal culture and cannot be assessed as an inconsistency of the constitutional court.

In its position of official interpreter of the Constitution, the constitutional court has a wide margin of discretion in choosing a method or another. Its choice is not random and depends on various elements that have to be identified to the utmost extent. If there are no serios reasons, a court cannot give up to a certain method of interpretation of a specific constitutional concept, because

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the interpretative method to which it adheres can affect either the presumption of constitutionality of the norm under review or the result of a legal dispute of constitutional nature, in other words the legal certainty.

Therefore, the aim of this paper is to debate and analyze the case law of the Constitutional Court of Romania in the light of the interpretative methods in use. As a conclusion, it emphasizes that all the aforementioned methods of interpretation can be found in the court's decisions and that in leading cases the living law method is frequently used in interpreting the Constitution of Romania.

Key words: Constitution; Methods of interpretation; Originalism; Textualism; Living law; Constitutional Court; Constitutional review of laws; Legal dispute of constitutional nature.

1. THE CONCEPT OF ORIGINALISM

Originalism is defined, by Paul Brest, as the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters. The most extreme forms of originalism are "strict textualism" (or literalism) and "strict intentionalism"; the former purports to construe words and phrases very narrowly and precisely while the latter to ascertain and give effect to the intent of its framers and the people who adopted it.[1]

L. Solum emphasizes that originalism may refer to: (1) Public Meaning Originalism, (2) Original Intentions Originalism, (3) Original Methods Originalism, and (4) Original Law Originalism. Both Public Meaning Originalism and Original Methods Originalism focus on the original meaning of the constitutional text. Intentionalism has a complex structure, including a version that focuses on the communicative intentions of the drafters - and hence the meaning of the text – but also including versions that seem to focus on purposes or outcome preferences. Original Law Originalism focuses on the original law (which might or might not be derived from the constitutional text) and those rules of constitutional change that were authorized by the original law - understood as the law that was in effect at the time the Constitution was ratified and put into effect.[2]

The "originalist" label became well-known when justice Antonin Scalia delivered a lecture at the University of Cincinnati, "Originalism: The Lesser Evil" in 1988. He associated himself with a "faint-hearted originalist"[3] and shifted

[1] P. Brest, "The Misconceived Quest for the Original Understanding", *Boston University Law Review* 60/1980, 204.

[2] L. Solum, "Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate", *Northwestern University Law Review* 6/2019, 1253–1254.

[3] A. Scalia, "Originalism: The Lesser Evil", *University of Cincinnati Law Review* 57/1989, 849–865. It is famous his inference: "I hasten to confess that in a crunch I may prove a faint-hearted originalist. I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging".

the theory from its previous focus on the intentions of the framers of the Constitution to the original public meaning of the text at the time of its enactment; this shift obviated much of the practical objection to originalism[4]. The original public meaning is the view that the meaning of the text is determined by the conventional semantic meaning of the words and phrases at the time each provision was framed and ratified[5] and it is the heart of the so called "*New originalism*".

2. APPLYING ORIGINALISM IN THE CASE LAW OF THE CONSTITUTIONAL COURT OF ROMANIA

In the case law of the Constitutional Court of Romania (hereinafter – CCR), there we can find some interesting decisions that apply the originalist theory in its various forms.

2.1. Public Meaning Originalism

One of the best examples that embraces public meaning originalism is Decision No. 580/2016[6] on the constitutionality of a citizen's legislative initiative that aimed to amend article 48 para. 1 of the Constitution.[7] This article states that "The family is founded on the freely consented marriage of the spouses, their full equality, as well as the right and duty of the parents to ensure the upbringing, education and instruction of their children", but the proposed constitutional amendment aimed to replace the phrase "marriage of the spouses" with "marriage between a man and a woman".

The CCR emphasized that the wished replacement constitutes only a "clarification regarding the exercise of the fundamental right to marriage, in the sense of expressly establishing that it ends between partners of different biological sex, that is, in fact, even the original meaning of the text. In 1991, when the Constitution was adopted, marriage was seen in Romania in its traditional sense, as a union between a man and a woman. This idea is supported by the subsequent evolution of the legislation on family law in Romania, as well as by the systematic interpretation of the constitutional norms of refer-

[4] R. Barnett, "Scalia's Infidelity: A Critique of 'Faint-Hearted' Originalism", *University of Cincinnati Law Review* 75/2006, 6. Barnett states the following critiques: "First, originalism is impractical because it is impossible to discover and aggregate the various intentions held by numerous framers. Second, originalism is actually contrary to the original intentions of the founding generation who themselves rejected reliance on original intent. Finally, originalism is to be rejected because it is wrong for the living to be bound by the dead hand of the past".

[5] L. Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory", *The Challenge of Originalism* (eds. G. Huscroft, B. Miller), Cambridge University Press, Cambridge 2011, 28.

[6] Decision No. 580/2016, *The Official Gazette of Romania, Part I*, No. 857 of 27 October 2016.

[7] According to article 146a 2nd sentence of the Romanian Constitution, the Constitutional Court has the power to adjudicate, ex officio, on initiatives to revise the Constitution.

ence. Thus, article 48 of the Constitution defines the institution of marriage in correlation with the protection of children borne "out of wedlock" or "in wedlock". It is obvious, therefore, the biological component that substantiated the constituent legislator's conception of marriage, being undoubtedly that it was seen as the union between a man and a woman, as long as only from such a union, whether in marriage or outside of it, children can be born.

The CCR adopted the public meaning originalism because it decoded the meaning of the phrase "marriage of the spouse" taking into account the semantic of these words at the time when the Constitution was enacted. The Romanian Constitution uses in article 48 the word "spouses", which in 1991 could refer only to two people of the opposite sex united by marriage. It is true that nowadays this word can have different meanings as some (European) countries – but not Romania – recognize the same-sex marriages. So, the content of the aforementioned word has been relativized by the social changes that took place in Europe. But the Constitutional Court has chosen the original meaning of the word and, as a consequence, put aside the possible modern meaning of it and maintained its semantic at the time when the Constitution was enacted.

In another decision[8] that solved a legal conflict of constitutional nature[9] the Court had to decode the meaning of article 132 para. 2 of the Constitution, article that provides: "Public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice." According to the infra-constitutional acts in force, the President of Romania have the competence to approve the request of the Minister of Justice for the removal of the chief prosecutor of the National Anticorruption Department from that very position. It was unclear if the President of Romania has to or may approve the request and in this factual context de CCR had to interpret the meaning of the final part of article 132 para. 2 of the Constitution – respectively what does it mean "*under the authority of the Minister of Justice*". The Court clarified the aforementioned phrase, stating that it does not refer to a merely administrative authority, but to an authority that concerns the activity of the prosecutors. The notion of authority has a very strong meaning, it being defined as the power to give orders or to impose obedience on someone, but, in the given constitutional context, it refers to a decision-making power regarding the management of the high ranked prosecutors' career. In order to reach this interpretation, the Court analyzed the intent of the framers of the Constitution, quoting the points of view expressed in the Constituent Assembly from 1991. This decision is an expres-

[8] Decision No. 358/2018, *The Official Gazette of Romania*, *Part I*, No. 473 of 7 June 2018.

[9] According to article 146e of the Romanian Constitution, the Constitutional Court has the power to solve legal disputes 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 of the president of the Superior Council of Magistracy.

sion of the public meaning originalism, too, because, even if it determines the content of the constitutional concept taking into consideration the points of view expressed in the Constituent Assembly, it is not based solely on the intent of the framers, but on the text, any exterior element of interpretation having the role of legitimizing the Court's stance on the original public meaning of the phrase "*under the authority of the Minister of Justice*".

2.2. Original Intentions Originalism

In Decision No. 64/2015,[10] the Court tackled the problem of the Constitution drafters' intention in the field of social rights. According to article 41 para. 2 of the Constitution, "all employees have the right to measures of social protection. These concern employees' safety and health, working conditions for women and young people, the setting up of a minimum gross salary per economy, weekends, paid rest leave, work performed under difficult and special conditions, as well as other specific conditions, as stipulated by the law." The CCR states that "the intention of the constituent legislator, by referring to "other specific situations, established by law" in order to determine the normative scope of the law, was to allow its configure and develop it in a dynamic way, allowing its adaptation to new economic or social realities that intervene in the evolution of society". This interpretation allowed to the Court to add an interpretative appendix to article 41 para. 2 of the Constitution, considering that the obligations to inform and consult the employees in case of collective redundancies are part of the right to social protection of labour and thus has constitutional value. The decision is valuable because it determines the intent of the framers of the Constitution and, very interesting, their intent was to enrich the right to social protection of labour with more and more social guarantees in line with the evolution of the society. So, this decision is an expression of the original intentions originalism because the law is not sufficiently clear, but it becomes clear only if the intention of the framers is determined.

It has to be pointed out another CCR's decision,[11] too, in which the Court had to decide on the prosecution unit's level within the Public Ministry that can carry out criminal proceedings against a deputy or senator. As a background context, there was enacted a law that provided a distinct organization of the National Anticorruption Direction, without being included in the traditional prosecutorial structure, namely in the structure of

[10] Decision No. 64/2015, *The Romanian Official Gazette*, *Part I*, No. 286 of 28 April 2015. It has to be noted that this decision was delivered within the CCR competence to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law (article 146d of the Constitution of Romania).

[11] Decision No. 235/2005, *The Official Gazette of Romania, Part I*, No. 462 of 31 May 2005.

the Public Prosecutor's Office attached to the High Court of Cassation and Justice. But the Constitution provided *expressis verbis* that the investigation and prosecution of the deputies or senators shall only be carried out by the Public Prosecutor's Office attached to the High Court of Cassation and Justice. The CCR found that that the intention of the constituent legislator to establish the exclusive competence of the Prosecutor's Office attached to the High Court of Cassation and Justice to carry out the investigation and prosecution of deputies and senators is obvious, because in the construction of the norm contained in article 72 para. 2 of the Constitution used the word "only", which gives it an imperative and exclusive character. Using the word "only", the constituent legislator understood that it confers this competence on a single state authority, namely the Prosecutor's Office attached to the High Court of Cassation and Justice, which cannot share it with any other prosecution unit, whatever their hierarchical position or competence. Given that the rules of jurisdiction are strictly interpreted, the Court retained the intention of the constituent legislator not only in relation to the drafting technique of the constitutional provision, but also in relation to the organizational reality of the two institutions in the composition of the public authorities' system. So, the meaning of the constitutional norm regarding the competent authority to investigate and prosecute deputies/ senators was determined by understanding and identifying the constituent legislator's intent. Of course, the law was declared unconstitutional and, as a consequence, the next step of the legislator was to include the National Anticorruption Direction in the structure of the Public Prosecutor's Office attached to the High Court of Cassation and Justice in order to assure its effectiveness in investigations.

2.3. Original Law Originalism

Original Law originalism cannot be applied when the original content of specific article of the Constitution was changed in a way that is incompatible with the original text of the Constitution. In this context, the Court expressly states that taking into account the revision of the Constitution, it has to be observed "the evolutionary character of the right of private property in the meaning of the constitutional norm of reference regarding foreign citizens and stateless persons, being eliminated in principle the prohibition of acquiring the right of private property of land".[12] The Court therefore notes that "the subsequent legislative framework must also follow this printed direction through the very constitutional norm".[13] So, when the original form of the constitutional norm does not correspond in any way with the new

[12] According to the initial version of the Constitution, foreign citizens and stateless persons couldn't acquire the right of property of land (ex-article 41 para 2, 2nd sentence of the Romanian Constitution of 1991 in its initial version).

[13] See Decision No. 355/2020, *The Romanian Official Gazette* No. 1084 of 16 November 2020.

one, the interpretation of the latter cannot be made through the former one. However, a *per a contrario* interpretation is acceptable.

3. THE MOVE FROM ORIGINALISM TO TEXTUALISM

Accepting and applying originalism does not mean that a constitutional court will exclusively develop its case law around its thesis. The case law is in a continuous movement and a court applies diverse techniques in order to assure the effectiveness of the constitutional review. The Court notices legislative developments and its stance has to be flexible, but faithful to the constitutional norm. Chief justice Marshall in *McCulloch v. Maryland* (1819)[14] stated that "we must never forget that it is a constitution we are expounding". Being asked about the constitutional significance of this sentence, Alex Kozinski points out that that "you don't have to interpret the Constitution restrictively, you have to interpret it broadly, to take into account changing circumstances, but still limit yourself to the interpretation of written words, without inventing a language that the Constitution does not contain".[15]

In this context of the changing circumstances that lead to diverse interpretation of a specific constitutional text, we mention Decision No. 678/2020,[16] delivered in *a priori* constitutional review.[17] In this decision, the CCR observed that article 63 para. 2 of the Constitution has been interpreted initially by the legislator in light of an originalist point of view, but, afterwards, it abandoned this view and applied a pure textualist interpretation. To be more specific, the Constitution provides that "*Elections to the Chamber of Deputies and the Senate shall be held within three months at the most of the expiry of the term of office or the Parliament dissolution*". The interpretation of this norm, given by the legislator, between 1992 and 2000 was that the elections have to be held in three months after the expiry of the term of office;[18] after 2000 the interpretation of this constitutional norm has

[14] See *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 316 316 (1819), available at: https://supreme.justia.com/cases/federal/us/17/316/#tab-opinion-1918127, 14th of April 2022.

[15] A. Kozinski interwoven by T. Papuc in *The constitutional heritage and the democratic values* (coord. by V. Dorneanu, D. Manole, B. Károly and T. Papuc), Hamangiu Publishing House, Bucharest 2021, 101.

[16] Decision No. 678/2020, *The Official Gazette of Romania, Part I*, No. 946 of 15 October 2020.

[17] According to article 146a 1st sentence of the Romanian Constitution, the Constitutional Court has the power to adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators.

[18] Analyzing the interventions of the members of the Commission for the drafting of the Constitution, it results that article 63 para. 2 of the Constitution provides for setting the date for the legislative elections within three months of the expiry of the term of office of

been reshaped, so that the elections can be held before the expiry of the term of office on the condition that the newly elected Parliament shall meet after the expiry of the ongoing term of office.[19] As a result, the general rule in the former interpretation is that election can be held only after the expiry of the term of office while in the latter election can be held before the expiry of the term of office on the aforementioned condition.[20]

The CCR considered that both interpretations can be accepted from a methodological point of view and it is up to the legislator to choose one or another. That is in its margin of appreciation. As a consequence, the Court ruled that both approaches met the standard of constitutionality, accepting that there should not be only an originalist interpretation of the constitutional norm.

Textualism considers in the process of interpretation of law only the words used in that specific law or document as they are commonly understood. But what is the timeframe that has to be taken into consideration? Textualism does not refer only to the time when the Constitution was enacted – because, in this situation, we should identify it with originalism, but, dependent of the interpreter, it can consider words/ phrases as they are commonly understood nowadays. So, textualism is not limited to originalism and does not entail the idea of temporality. That's why it offers the possibility to stir from originalism to living law (constitutionalism), without affecting the conceptual unity of the Constitution.

Parliament. In other words, it was not envisaged that the election date be set within the aforementioned term, such a possibility being ruled out. Thus, the election date, according to the drafters, must take place after the expiration of the mandate, namely in the three months following it, a period in which Parliament would not meet in plenary to avoid the situation in which it would give populist laws to guarantee the success of the ruling party and does not ensure equal opportunities for political parties [the speech of Mr. Ioan Vida in D. Ioncică, O. Stângă, V. Puiu, *Geneza Constituţiei României 1991 – Lucrările Adunării Constituante* (*Genesis of the Romanian Constitution from 1991 – the Constituent Assembly works*, R. A. Monitorul Official Publishing House, Bucharest 1998, 619–620 and 685). In reply, it was stated that such populist laws could be adopted 24 hours before the three months, so that even in these 3 months the Parliament should have "all the powers, all the prerogatives to defend the sovereignty of this people". (the speech of Mrs. Elena Dumitru – *Ibid.*, 686] . It was also pointed out that the limitation of Parliament's powers during this period should only concern the possibility of revising the Constitution [the speech of Mr. Kozsokár Gábor – *Ibid*., 685]. A compromise solution has been reached, according to which organic laws cannot be adopted, amended or repealed during this period, nor can the Constitution be revised.

[19] This means that the elections can take place 19 days before the expiry of the ongoing Parliament's term of office [because the newly elected Parliament shall meet upon convening by the President of Romania, within twenty days of the elections – article 63 para. 3 of the Constitution] and, of course, in the next three months after the expiry of the aforementioned term of office.

[20] If the Parliament wants to depart from the general rule and organize election within the three months after the expiry of the term of office, it has to adopt a special law in this sense in order to establish the date of election in that specific period of three months.

4. TOWARD A LIVING LAW APPROACH

The living law theory was established and promoted by Eugen Ehrlich in his work "Fundamental Principles of the Sociology of Law". In the foreword of his work, Ehrlich states that "at the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself". Ehrlich considers that "but the statement that the whole law is not contained in the legal propositions applies to a much greater degree to the law that is in force today than to the law of the past".[21] Living constitutionalism,[22] as part of the living law theory, means that constitutional concepts are construed and adapted in the light of ever changing political, social, economic or cultural circumstances or values. So, the circumstances, realities, factual situations are shaping the content of the constitutional norms and all these have to be taken into account by the constitutional judges in their activity. It appears that *facts* are those that connect the dynamic content of the constitutional norm to the present.

There are some interesting decisions of the CCR that concern the application of the principle of living law.

First of all, we have to mention Decision No. 766/2011[23] in which the Court reversed its jurisprudence concerning the acts that can be object to its review. Until 2011 only legislative acts that were in force at the moment of delivering the decision could be object of the constitutional review. But, in this decision, the Court emphasized that "is indisputable that society is evolving, and the new political, social, economic, cultural realities have to have a normative expression, to be found in the content of positive law. The law is alive, so that, together with society, it must adapt to changes. Thus, laws are repealed, reach their time limit, amended, supplemented, suspended or simply fall into disuse, depending on new social relations, requirements and opportunities. However, all these legislative incidents and the normative solutions they enshrine must respect the principles of the Basic Law. The Constitutional Court, once notified, has the task of controlling the norm, being irrelevant that the norm criticized for unconstitutionality belongs or not to the active part of the legislation". As a consequence, in spite of a consolidated case law between

[21] E. Ehrlich, *Fundamental Principles of the Sociology of Law*, Cambridge 1936, 487.

[22] The phrase "living constitutionalism" seems to be derived from the title of a book by Howard Lee McBain, *The Living Constitution*, first published in 1927. See L. Solum, *Legal Theory Lexicon: Living Constitutionalism*, available at: *https://lsolum.typepad.com/legaltheory/2018/11/legal-theory-lexicon-living-constitutionalism.html*, last accessed on the 14th of April 2022.

[23] Decision No. 766/2011, *The Official Gazette of Romania*, *Part I*, No. 549 of 3 August 2011. This decision was delivered within the CCR competence to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law (article 146d) of the Constitution of Romania).

1992–2010, the Court re-interpreted article 146d of the Constitution – article that concerns its own competence – in order to be able to perform the constitutional review of the legislative acts that are no more in force, but which continues to apply in the specific case that generated the referral.

Secondly, the Court makes reference to the so called "evolutive constitutional concepts" in order to signal that living constitutionalism is part of its interpretative arsenal. In Decision No. 498/2012,[24] the Court states that "the concept of market economy is a living, evolving concept, so that the Court cannot interpret it as one with a fixed, immutable content, but considering the socio-economic situation of the state. The state, by virtue of its constitutional obligation provided by article 135 of the Constitution, must show a flexible attitude in stimulating economic operators in promoting progress, in the freedom to undertake and increase efficiency and to give buyers the opportunity to choose in a free market, which expresses the modalities of orientation of human action to meet the system of needs, and, on the other hand, economic operators must undertake acts of trade for which they have been authorized, in compliance with the legal rules on marketing, hygiene, quality preservation and fair competition". By interpreting the concept of market economy in this manner, the Court changed its case law concerning the law that classified as contravention the legal person conduct of buying goods for resale from legal persons that were selling *en detail* – not *en gross.* As a result of this change of jurisprudence, the CCR declared the unconstitutionality of the respective legal norm.

In Decision No. 80/2014,[25] the CCR evaluated the constitutionality of a parliamentary legislative initiative that aimed to amend article 26 para. 2 of the Constitution, that has the following content: "*Any natural person has the right to freely dispose of himself unless by this he infringes on the rights and freedoms of others, on public order or morals*". The aim of the initiative was to eliminate the reference to "moral". The Court stated that the phrases "good morals" or "public morality" are evolutionary concepts, which in principle refer to norms of coexistence and behavior in society. These are identified and must be understood "in terms of the norms of social behavior of the individual in his manifestations and expressions in any form". It is about the public feeling of modesty and decency, the disregard of which cannot be tolerated. Manifestations contrary to public morality are socially dangerous, because they deny one of the conditions for the existence of society and impede the education of young generations in respect for the moral

[24] Decision No. 498/2012, *The Official Gazette of Romania*, *Part I*, No. 428 of 28 June 2012. It has to be noted that this decision was delivered within the CCR competence to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law (article 146d of the Constitution of Romania).

[25] Decision No. 80/2014, *The Official Gazette of Romania, Part I*, No. 246 of 7 April 2014.

values of society. The fundamental rights and freedoms which it provides may not be exercised in a manner contrary to good morals or which would prejudice public morality. The Court did not accept the elimination of the reference to "moral" from the constitutional norm and emphasized that it has to be interpreted according to the requirements of the society.

In another case, the Court had to evaluate the constitutionality of article 19 para. 3 of Law No. 14/2003 on political parties, that required a number of 25.000 founding members in order to legally register a political party. By Decision No. 75/2015,[26] the Court noted that the reasons set out by the legislator at the time of the adoption of the law no longer correspond to the current situation of Romanian society, taking into account the political and historical evolution of the democracy installed at the end of 1989. Thus, if the risk of creating a large number of political parties, the "devaluation" of the idea of political party, the fragmentation of their parliamentary representation and an excessive burden on the state budget due to their public funding was an acceptable justification in the socio-political context of the 1990s. The Court noted that, at that time, the minimum number of founding members for the registration of a political party was the lowest in the entire evolutionary history of the relevant legislation, i.e. 251 members (1989–1996) and 10,000 (1996–2003). Then, 14 years after the Romanian Revolution of December 1989, which marked the change of the communist regime and the transition to the form of a democratic state, the legislator, in 2003, significantly increased this number again, citing reasons of the same nature. However, the Court found that the circumstances previously considered by the legislator are no longer applicable because there is no risk of "devaluing" the idea of a political party or inflation of political parties, with all the consequences considered at the time of the adoption of the law. As a consequence, the Court noted that the provisions of article 19 para. 3 of Law No. 14/2003 regulates a measure that, in relation to the current stage of the evolution of the Romanian society, no longer corresponds to its necessity requirements and that, due to its excessive character, it leads to the impossibility of effectively exercising the right of association, which is affected in its very substance. Thus, the Court considered that the aforementioned provision affects the right of association, guaranteed by article 40 of the Constitution.

So, the Court has had an evolutive approach toward the interpretation of article 40 of the Constitution regarding the right of association; as a result, if initially this constitutional right allowed the legislator to pass a law that regulated a high threshold of members in order to set up a political party, after 2015 it is no more possible, as the Court interpreted this fundamental right in the sense that the legislator is obliged to reduce this threshold in a significant way.

[26] Decision No. 75/2015, *The Official Gazette of Romania*, *Part I*, No. 265 of 21 April 2015.

We have to mention the CCR's case law concerning the enforcement of judicial decisions in the field of bonuses/supplements to salaries that had to be paid to the public servants during 2009–2010. The Court noticed that the amount of money at stake has a systemic, structural effect on the state's budget in the context of the severe economic and financial crisis from that period and upheld all the laws that prolonged the enforcement of these judicial decisions for a period of 5 years.[27]

Finally, by Decision No. 538/2018,[28] the Court notes that it has developed an "evolutive case law", shaping and reshaping in a short time one of its attributions provided by the Constitution, namely the attribution of solving legal conflict of constitutional nature. Initially, immediately after being established this attribution of the Court, it observed that the legal conflict of a constitutional nature between public authorities presupposes concrete acts or actions by which one or more authorities arrogate their powers, attributions or competences, which, according to the Constitution, belong to other public authorities, or the omission of some public authorities, consisting in declining competence or refusal to perform certain acts that fall within their obligations.[29] But, after 4 years, the same constitutional concept concerns "any conflicting legal situations whose origin lies directly in the text of the Constitution".[30] That's why the Constitutional Court considered that it had an evolution in its case law, reshaping the invisible content of a specific constitutional concept. This flexibility of interpretation shows that the Court adapted the constitutional concept to the constitutional realities with which it was confronted to.

We can observe that when the Court uses notions like "evolutive constitutional concepts" or "evolutive case law", it adheres to a living law interpretation of the constitutional provisions. Although the Court does not always point out the causes that determined such a vision in a certain field, it tries to explain the new realities that have intervened. Moreover, a living law interpretation is easier to apply for judges because it values the experience of the present and judges have a better perception of it while an originalist

[27] See Decision No. 188/2010, *The Official Gazette of Romania, Part I*, No. 237 of 14 April 2010, Decision No. 190/2010 *The Official Gazette of Romania, Part I*, No. 224 of 9 April 2010, Decision No. 712/2010, *The Official Gazette of Romania, Part I*, No. 416 of 22 June 2010, Decision No. 713/2010, *The Official Gazette of Romania, Part I*, No. 430 of 28 June 2010, Decision No. 714/2010, *The Official Gazette of Romania, Part I*, No. 422 of 24 June 2010, Decision No. 823/2010, *The Official Gazette of Romania, Part I*, No. 611 of 30 August 2010, or Decision No. 1533/2011, *The Official Gazette of Romania, Part I*, No. 905 of 20 December 2011.

[28] Decision No. 538/2018, *The Official Gazette of Romania, Part I*, No. 1076 of 19 December 2018.

[29] Decision No. 53/2005, *The Official Gazette of Romania, Part I*, No. 144 of 17 February 2005.

[30] Decision No. 901/2009, *The Official Gazette of Romania, Part I*, No. 503 of 21 July 2009.

approach needs to be substantiated in respect to the time of the enactment of the Constitution, requiring prolix legal "archeological" research.

5. CONCLUSIONS

The interpretative method to which a certain constitutional court adheres can affect either the presumption of constitutionality of the norm under review or the result of a legal dispute of constitutional nature. The court has to be very careful when choses certain methods of interpretation of specific constitutional concepts and has to be constant in its choice because otherwise it is affected the coherence of the constitutional system and the legal certainty; once it has chosen the method of interpretation of a specific constitutional concept, it cannot change it unless such a change is stringent and justified by totally new circumstances and only if it motivates the accepted shift. Every court is aware of the fact that acceptance/change the interpretative method that is in use can affect the outcome of the constitutional adjudication and, as a consequence, has to be reluctant to such methodological shifts.

The Constitutional Court of Romania has in principle a living law approach when it comes about interpretation of the Constitution and its most important decisions has been delivered in this specific interpretative context, but it does not exclude the originalist approach. The role of the interpretative methods is to decode and adapt the normative content of the Constitution in a manner that guarantees the separation and balance of power, on one hand, and the fundamental rights – that are always on move, on the other hand. The Romanian experience proves that there can be a harmonious coexistence between two opposed methods of constitutional interpretation as long as the effectiveness of the constitutional review is guaranteed. Moreover, it assures the necessary conditions for a constitutional court to manifest itself either in an active or in a bickelian way. But there is enough room to improve the CCR's stance in relation to the use of the interpretative methods. The Court's approach has to be explicit, consistent, predictable and made within an accepted and acknowledged legal paradigm. Because an acknowledged and well-structured paradigm is the starting point for a balanced constitutional adjudication that leaves behind the so called post-communist constitutional transition that blatantly follows every step of the Eastern European societies.

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Помоћник главног суца – Уставни суд Румуније

ОРИГИНАЛИЗАМ, ТЕКСТУАЛИЗАМ И ЖИВО ПРАВО У СУДСКОЈ ПРАКСИ УСТАВНОГ СУДА РУМУНИЈЕ

Сажетак

Правна норма је правило понашања које је установила или признала јавна власт и чија примјена се осигурава правном савјешћу и, уколико је то неопходно, путем присиле, углавном од стране државе. Претпоставља се да је правна норма у складу са Уставом те јој се приписује тзв. пресумпција уставности. Уставни суд оцјењује уставност правних норми у односу на референтни стандард тј. Устав, основни правни акт државе. Резултат оцјене односи се на потврђивање или одбацивање претпоставке уставности правне норме. Устав није замишљен као неки

апстрактни инструмент већ, напротив, сваки уставни концепт треба да буде дефинисан, структурисан и примјењен у националном законском оквиру. Како би гарантовао примат Устава, уставни суд има најважнији задатак: да одреди значење уставних норми и да утврди њихов однос са међународним споразумима које је држава ратификовала. У вршењу овог одговорног задатка методе тумачења Устава играју кључну улогу у процесу доношења пресуда. Методе које се користе могу да валоризују изворно или актуелно значење уставне норме или могу да узму у обзир и политичке, економске, друштвене или културне трендове. Избор одређеног метода или мјешавине њих за тумачење уставних норми условиће ланчану реакцију у правном животу државе. Избор је питање правне културе и не може бити сматран недосљедношћу уставног суда.

У својој улози званичног тумача Устава уставни суд има широко дискреционо право да одлучује о избору метода. Избор није случајан и зависи од мноштва елемената који морају да буду у потпуности идентификовани. Уколико не постоје озбиљни разлози, суд не би смио да употријеби одређени метод за тумачење неког уставног концепта јер одређени метод може да утиче на претпоставку невиности норме која је предмет оцјењивања или на исход правног спора уставне природе, другим ријечима, може да утиче на правну сигурност.

Стога је циљ овог рада да анализира праксу Уставног суда Румуније у смислу методе која се користи у тумачењу одредаба. Као закључак може се истаћи да се при доношењу одлука употребљавају све наведене методе, те да је метода живог права она која се користи у водећим случајевима тумачења Устава Румуније.

Кључне ријечи: *Устав; Метод тумачења, Оригинализам, Текстуализам, Живо право; Уставни суд; Уставна ревизија закона; Правни спорови уставне природе*.