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BEHIND THE BENCH: UNVEILING THE DYNAMIC INFLUENCE OF SCHOLARS ON THE DEVELOPMENT OF THE REASONING OF CONSTITUTIONAL COURTS

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Abstract. Constitutional courts, entrusted with the mission of protecting the supremacy of the constitution and having the power to eliminate legislative and executive acts from the legal system, play an important role in the law-making process. The official constitutional doctrine formulated in constitutional rulings becomes part of the living constitution, binding every state institution and individual. Therefore, the quality of constitutional reasoning must be beyond any doubt. This article argues that constitutional courts interpreting constitutional norms might benefit from the academic legal doctrine. The influence of academic research on constitutional case-law depends on the jurisdiction, the constitutional traditions, and the subject matter of each case. After comparing the constitutional jurisprudence of Romania and Lithuania, which feature entirely different attitudes towards the use of academic research in constitutional jurisprudence, the authors define different levels of scholarly impact on the resolution of constitutional justice cases, revealed through methods of judicial interpretation. The article concludes that the research-case-law partnership might contribute to the evolution of the legal system. High-quality research increases the quality of case-law, and its potential to be recognised as a source of law, even if indirect, increases through the authority that legislation based on it acquires.

Keywords: constitutional review, constitutional justice, rule of law, constitutional doctrine, academic doctrine, judicial reasoning.

Introduction

Recent debates regarding the place, role, ethical dilemmas and even usefulness of research in law, in conjunction with those regarding the quality of the reasoning of court decisions given the enhanced complexity of the law, have encouraged research into the way in which the legal doctrine might be used in the reasoning of constitutional courts (hereinafter – CCs). The term *legal doctrine* in this paper encompasses the legal science, including analyses, investigations, interpretations and other academic research undertaken by scholars in different fields of law. The notions of *academic doctrine* or *legal literature* might also be used as synonyms to define informal sources of law that might determine the development of constitutional jurisprudence.

The importance of constitutional justice and its impact on the law-making process determine the selection of this jurisdiction for this study over the traditional activities of courts of law. Legislation is, in part, the result of the actions of constitutional judges, often defined as negative legislators or specific co-legislators. Given this role, the use of the legal doctrine by CCs is relevant, both in view of the support given to the constitutional judge and, implicitly, the quality of the decisions they render, and in view of the legislator shaped by constitutional case-law. Taking this into consideration, one can elaborate on the role of the legal doctrine if not as a source of law, then at least as a source of inspiration when creating the law. Therefore, the role and profile of legal

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researchers in contemporary society might be revealed, being seen by certain authors as necessarily 'invisible' (Lafaille, 2022, or for insight on law activism, see Khaitan, 2022), and by other authors as 'involved in the life of the city' (Duțu, 2022a). Scholars can be conceived of as 'knowledge institutions' that 'help to provide the epistemic foundation for a successful democracy', as knowledge is needed to develop and evaluate policy positions, to be able to resist manipulations, to evaluate good-faith arguments and to engage in reasoned arguments (Jackson, 2019).

The legal researcher should not and cannot be a simple technician:

> The representation of legal experts as simple technicians, whose activity would consist only of interpreting and applying the law, refraining from any value judgment on its content and disregarding the philosophical or political beliefs that they may have as citizens; however, it appears as illusory in fact and in practice (Duțu, 2022a).

The legal researcher must be visible, credible, a 'total man of law' (Duțu, 2022a), with a 'deep and extensive knowledge of the field and a legal culture strongly rooted in the general and strongly humanistic one'. This is because the legal researcher does not project themselves into an ideal world, but one with concrete, tangible issues. This does not speak in favour of the kind of activism that raises the issue of academic ethics, which has been criticised in recent studies (Kaithan, 2022). However, this type of activism is inherently marginalised, to the effect that it is not given authentic valorisation by the judge or legislator.

The analysis of different constitutional jurisprudence that implicitly or explicitly reflects the works of scholars allows it to be observed that there is undoubtedly a dialogue between doctrine and case-law. The roots of this phenomenon might be found in antiquity or the medieval era, where in the absence of codification and given the importance of customary law, judges appealed to comments from scientific works. Consequently, the role of the doctrine decreased considerably in the modern era, as the written act became a source of law. Now, the growth of the role of the legal doctrine to the extent of the exponential expansion of the normative framework and the enhanced specialisation of the fields of law can be observed. Alongside this is the continuous and rapid emergence of new realities to which the legislator must respond and the judge must adapt, settling disputes arising from these rules or in which these rules apply.

The recent Congress of the World Conference on Constitutional Justice, the international platform for global discussions among constitutional judges, illustrates these current trends. As one comment regarding this global event noted, 'the academic dimension of such a judges' conference is less surprising when considering that it is not unusual for CC judges to hail from academia, and even continue academic activities during their career as judges' (Steuer, 2022). The same author concluded that

> similarly to judges reaching out to academia (including via calls to share expertise in particular domains of law and practices of legal pluralism), academics should actively approach judges, particularly if they hope the results of their research to reach beyond the 'ivory towers'. The recognition of the value but also challenges of both professions might help generate mutual trust and the development of more nuanced ideas for enhancing constitutional court resilience vis-à-vis autocratization.

Therefore, it is important to use academic-judicial cooperation for mutual enrichment and strengthening. How can this goal be achieved, and what insights can be revealed? No systematic study comprehensively answers this question. In trying to fill this gap, the authors analyse the constitutional jurisprudence of the Romanian and Lithuanian CCs. Being of a similar age, both courts were established in the early 1990s, but are very different in terms of their use of the academic doctrine, although neither can fully escape its influence. This paper begins by identifying the normative framework for the use of the legal doctrine in the resolution of constitutional justice cases, and then selects decisions from the corresponding CC that explicitly refer to the legal doctrine or literature, as in the Romanian case, or implicitly contain hints that the legal doctrine was used while resolving the case, as in the Lithuanian court.

The paper offers a classification of constitutional decisions based on the degree of valorisation of the doctrine

in terms of its importance within the reasoning of the decisions. Preliminary conclusions (in terms of establishing grounds for wider research) are formulated, with reference to the reasoning of the constitutional decisions and the role of the doctrine in the development of the normative system, with particular emphasis on the responsibility and accountability required on both levels.

1. The legal framework of constitutional courts invoking scholarly research

The legal framework of the organisation and functioning of CCs consists of constitutional provisions, specialised law and internal procedural regulation. While the provisions regulating the constitutional procedure are sufficiently detailed, the preparation of cases for examination (pre-examination stage) and the rules of drafting a constitutional decision are not usually reflected in the laws (or, if they are, it is only in a very laconic manner), and are instead regulated by well-established practices and traditions. However, the need to rely on different sources of law arises at the preparation of the case for examination in the hearing stage.

The Romanian legal regulation concerning the possibility of referring to the academic doctrine is more explicit than the Lithuanian. This might explain why the CC of Romania is more ambitious in relying on academic sources when resolving cases compared to Lithuanian constitutional jurisprudence, in which there are only hints of traces of academic research. Therefore, it might be meaningful to first compare the legal provisions regulating the preparation stage of constitutional justice cases in these states.

The competence, composition and functioning of the CC of Romania is regulated by the provisions of Articles 142–147 of the Constitution of Romania (1991) and the Law on the Organisation and Functioning of the Constitutional Court (2010). In the application of these provisions, the Regulations on the Organisation and Functioning of the Court (2012; hereinafter – the Regulations) were adopted, approved by Plenum of the CC. The Regulations detail, *inter alia*, the activity prior to the hearing session, during the hearing session and following the session of the pronouncement of the decisions of the CC of Romania.

The Regulations refer to the doctrine in the section dedicated to the *activity prior to the hearing session*, where it is held, in Article 47 (5), that the judge rapporteur, while preparing a written report on a case, has a duty, among other things, to examine Romanian and foreign literature relevant to the case topic.[3] Accordingly, among the tasks of the assistant-magistrates, while preparing the draft report, is to ensure necessary documentation for the judge-rapporteur in regard to the relevant conclusions in Romanian and foreign case-law and/or literature in the cases assigned to them (Article 12 (c). Likewise, Article 47 (4) of the Regulations stipulates that 'the Judge-Rapporteur may solicit expert advice from individual persons or institutions, with prior approval by the President of the Constitutional Court.' As the case-law of the CC of Romania reveals, this expert advice may consist of legal opinions from reputable specialists or professors in the field, but this is an isolated practice.[4]

Therefore, even the internal rules of the Court compel it to study the legal doctrine in the matter, inducing the idea of an exhaustive examination in order to ensure as solid a foundation as possible for each case. However, there is no standardised format of the report in terms of express rules regarding its structure from a formal point of view, nor any obligation to draw up a separate doctrinal sheet (as in the case of legislation and case-law[5]), nor even sanctions regarding the lack of mention of the legal doctrine in the report. In practice, the consistency of references to the legal doctrine is highly dependent on the judge-rapporteur and/or the assistant-magistrate

[3] Article 47 (5) of the Regulations: 'The Judge-Rapporteur, having examined the draft report [drawn up by the assistant-magistrate], the viewpoints and other information made available, or conclusions from Romanian and foreign case-law and/or literature, as well as other elements that appear to be necessary for debate, shall prepare a written report on the case.'
[4] For example, in Decision No. 9/1994 of 25 November 1994, '… it was also requested the viewpoint of Professor Gheorghe Beleiu, PhD, from the Faculty of Law of Bucharest' or Decision No. 123/2013 of 16 April 2013, '… it was requested the expert advice of Ms. Brânduşa Ştefănescu, university professor and doctor emeritus.'
[5] See Article 19 of the Regulations, regarding the specialised legal staff assimilated to assistant-magistrates, who 'has the following tasks: a) to prepare the information sheet on domestic legislation and Constitutional Court case-law and their updates for the cases assigned to Judges whose office is not staffed with legally trained personnel; b) to prepare the information sheet on international legislation and case-law as well as other documentation, upon request by the Assistant-Magistrate assigned to the case'.

assigned to the case. During the hearing sessions, the Plenum of the CC of Romania may request the completion of the report, including with the doctrine, when the issue examined is not clear. As long as there is no obligation to record the legal doctrine in the pronounced decisions, it is not possible to truly verify the way in which the judge-rapporteur or assistant-magistrate and then the Plenum of the CC proceeded to examine the doctrine in the matter.

The Lithuanian legal regulation is even less explicit regarding the use of the legal doctrine in the preparation of constitutional justice cases for hearings. Chapter VIII of the Constitution is dedicated to the composition and competence of the CC of Lithuania and the guarantees of constitutional judges. The Law on the Constitutional Court (1993; hereinafter – the Law on the CC) details the tasks, powers, and work procedure of the CC of Lithuania.

Article 27 of the Law on the CC regulates the preparation of cases for the hearings of the CC of Lithuania, and provides a list of actions that the judge-rapporteur can perform in order to prepare the case. It stems from the provisions of this article that the aim of the preparation of a case for a hearing is to gather as much information relevant to the case as possible (ask questions to the petitioner and concerned person, hear witnesses, consult experts or ask opinions of impartial specialists, etc.).

The Law on the CC does not mention *expressis verbis* that researchers can be consulted for their opinions or summoned to the hearing, but Article 27 is provided as a legal basis to address academics, as professors and researchers are seen as the most impartial specialists. This is due to the nature of scholarly expertise, which is protected by academic freedom and is publicly recognised as an authority within democratic discourse beyond the internal academic audience (Lazarus, 2020, p. 495). The case-law of the CC of Lithuania shows that, depending on the topic and complexity of the case, the legal opinions of researchers are welcomed in the preparation of constitutional justice cases in different fields of law. The practice of contacting academics for their opinions regarding the subject matter of cases can be observed since the beginning of the activities of the CC of Lithuania. When academics are consulted, they are referred to by name in the establishing part of the ruling,[6] and sometimes their main arguments are also summarised in the text of the ruling (for instance, the ruling of 12 February 2021 on the right of scientists and lecturers over 65 years of age to work in Vilnius University). This means that the CC took them into consideration and most often resolved the case accordingly, although this rule is not absolute.[7] In Lithuanian constitutional jurisprudence, this is the only point at which researchers can be *expressis verbis* mentioned by their names in the rulings of the CC of Lithuania, and this can

[6] For example, in the ruling of the CC of Lithuania of 1 June 1998 on compensation for damage done to forests it is noted that 'in the course of the preparation of the case for the judicial investigation, the conclusions of the specialists – Prof. Habil. Dr. V. Mikelėnas, head of the Department of Civil Law and Proceedings at the Law Faculty of Vilnius University and … were received'; in the ruling of 9 July 1998 on the manufacture, storage, transport, sale and realisation of alcohol of various kinds, where the explanations of specialists – Dr. A. Vileita, assoc. prof. at the Department of Civil Law and Procedure at the Law Faculty at Vilnius University, Assoc. Prof. Dr. A. Vaišvila, head of the Department of the Philosophy of Law at the Law Academy – were received. This practice continues to today: in the ruling of 5 July 2023 on the writing of personal names using Latin alphabet characters in documents certifying the identity of a person, part of the case material contained the opinions of higher education institutions and individual scholars conducting research on various aspects of Lithuanian linguistics related to the tradition of writing personal names and changes in their spelling and the impact of the contested legal regulation on the generic Lithuanian language. The opinions of the following specialists were consulted: Associate Professor A. S. Smetona from the Department of the Lithuanian Language at the Institute of Applied Linguistics at the Faculty of Philology at Vilnius University; Prof. D. Sinkevičiūtė, head of the Department of Baltic Languages and Culture at the Baltic Languages and Cultures Institute at Vilnius University; and the written opinion of the Institute of the Lithuanian Language, submitted by its director, Dr. A. Auksoriūtė.

[7] In the ruling of the CC of Lithuania of 30 July 2020 on the adoption of constitutional laws, an opinion prepared by Prof. Dr. Vytautas Sinkevičius was submitted (point 3) and his position regarding the subject of the case was revealed, explaining that the Constitution does not forbid the adoption of ordinary regulation (even its new wording) when the regulation of a particular relationship is provided in the list of constitutional laws. However, the CC of Lithuania took the opposite position, recognising the new wording of the Law on Referendums to be in conflict with the Constitution because this law had to be adopted as a constitutional, and not ordinary, law. Similarly, in the ruling of 15 April 2022 on the dismissal of the judges of the Supreme Court of Lithuania and the Court of Appeal of Lithuania, prof. V. Sinkevičius published an opinion different to that which the Court decided to pursue prior to the examination of the case.

only take place specifically in the format of an opinion provided upon the request of a constitutional judge.

The Rules of the Constitutional Court of the Republic of Lithuania (2019; hereinafter – the Rules) adopted by a decision of the CC of Lithuania regulate, among other things, the organisation of the work of the CC and the preparation and consideration of constitutional justice cases. Section II of Chapter VII of the Rules regulates the procedure of preparation of a constitutional case for consideration and hearing, but is silent on the specific methods, measures and means to be used for the preparation of the case. Differently from the Romanian example, the acts regulating the work of the CC do not include provisions on the work of judicial assistants. Only from the Regulations of the Office of the Constitutional Court, approved by a decision of the CC of Lithuania (2019), can it be seen that judicial assistants, helping the judges to implement their functions related to the preparation of constitutional justice cases for judicial consideration, prepare notes comprehensively introducing the judges to the issues of the constitutional justice case under preparation and offering a reasoned legal position on the questions to be resolved in the case (point 21.2). No further regulation on what information should be included in the notes is provided. Usually, the task of the assistant is to gather as many relevant sources as possible. The consultation of the CC of Lithuania archives and the analysis of the materials of numerous constitutional cases reveal that academic articles and research often join the supplementary unofficial material to the case, and references to those that are considered by the judges before drafting the ruling are made in the notes of the case.

Hence, similarly to the Romanian example, the laconic Lithuanian legislation concerning the preparation of the case does not provide for the obligation to study the academic material and does not mention its inclusion in the case or the notes to the case, which, contrary to the French example of the publication of the *Dossier documentaire* (2022), are never published. However, it is obvious that the case cannot be properly prepared if all of the sources relevant to the topic of the case are not examined. It is the responsibility of the judge-rapporteur to take all necessary steps to prepare the case, without imposing on them the duty to seek the opinions of academics or to study their previous works. Thus, it might be concluded that it remains under the discretion of the judge preparing the case and the judges considering the case in the next step of preparation to decide which sources, including those of an academic nature, might be relevant to its resolution. The practice of studying academic works while preparing a case for a hearing is consistent; however, as will be shown later, in most cases these endeavours remain latent and are not revealed in the text of the constitutional ruling.

2. The use of the academic doctrine in constitutional case-law: Approaches and Strategies

As there are no official statistics on the topic of this paper and the search engines offered on the websites of CCs do not allow us to filter out the acts in which the academic doctrine is mentioned, a search of the Romanian case-law using the keywords ‘doctrine’ or ‘literature’ was undertaken. The Lithuanian case was more complicated, as the word ‘doctrine’ also leads to the ‘official constitutional doctrine’ encountered in every ruling, and the word ‘literature’ might be used citing legal regulation containing this word. Therefore, when performing the Lithuanian search, various synonyms were used, such as ‘scientific doctrine’, ‘specialised literature’, ‘doctrine of …’ [criminal law, criminology], etc.

This allowed the visible use (in terms of express mention) of the legal doctrine in the case-law of the CCs to be detected. The expression ‘visible use’ describes the personal experience of actually working with these case files for almost two decades, as well as the legal framework that sets up the jurisdictional activity of the court (referred to above). This leads to the conclusion of whether or not the use of the academic doctrine may be visible. In other words, the study of the legal doctrine selected while preparing the report or the notes on the case that are the basis of the constitutional decision can have an explicit use in the final constitutional text (whether referring to the author or the particular research), or can simply serve as the research of the judge/judges of the court, without being mentioned in the final decision. The invisible impact of academia on constitutional jurisprudence is much more difficult to detect, as this requires not only a study of the constitutional text, but also of the preparatory material of the case, which is usually accessible in the archives of CCs.

Taking into account that some examples of judicial-academic cooperation might be hidden under this invisible use of scientific literature, another method of detecting the appropriate rulings was used. In order to identify

constitutional rulings possibly influenced by academia, the descriptive part of the ruling in which the experts or specialists who have contributed to the case with their opinions are listed was taken into account. Very often, academics providing opinions in constitutional justice cases rely on their own works, which are later studied by judges and assistants in more detail than they are referred to in the opinion.

In some decisions, a form of middle ground is occupied, in the sense that the analysis of the constitutional text allows the reader to understand that the legal doctrine was taken into account, as long as the existence of 'different interpretations in the doctrine' (CC of Romania, Decision of 11 April 1995) or 'doctrinal controversies' (CC of Romania, Decision of 24 September 1996) or the 'scientific literature' (CC of Lithuania, Ruling of 13 December 2004) is mentioned in the recitals of the decisions, but without making their presence explicit or giving them any effect/importance in the statement of reasons.

As indicated above, there is no legal obligation to mention the legal doctrine in the final text of constitutional decisions, even if it has contributed to the resolution of the case, and there are no clear criteria limiting the option to use it explicitly or not. The principle that the CC resolves cases relying only on the provisions of the constitution and the official constitutional doctrine (Kūris, 2003), being the core element of the constitution-centric legal system, is not relevant anymore, or should at least be regarded with moderation. Being part of a global constitutional order sharing common fundamental values of the rule of law (Suchocka, 2016, p. 6), CCs cannot ignore the international context and the large variety of international instruments determining the understanding of the national constitution. The fact that the content and meaning of national constitutional norms are revealed by relying on universal international treaties does not come as a surprise any longer. However, revealing the significant number of explicit and implicit references to the legal doctrine in constitutional decisions, one might identify a preliminary ascertainment in the sense that the constitutional judge feels the need for the broader, more consistent or more credible substantiation of their decisions.

It is unsurprising that academics play a significant role in shaping the development of the constitutional doctrine, particularly in reconstituted democracies such as Lithuania or Romania, where constitutional frameworks are frequently drafted by professors and researchers. Given their involvement in the initial drafting stages, scholars possess an intimate understanding of the underlying principles and nuances embedded within constitutional texts. Moreover, especially in the years after the establishment of constitutional control institutions, the official constitutional doctrine was often drafted on a blank page. Nonetheless, the engagement of scholars in shaping legal frameworks is characteristic not only of emerging democracies, but also of established systems. The constitutive role of scholarship has also had implications across European constitutional cultures with greater or smaller interventions (Lazarus, 2020, p. 491), invoking as a random example the *R (Miller) v. Secretary of State for Exiting the European Union* (2017) case of the Supreme Court of the United Kingdom, where the argumentation of academics was accepted by the Court (UCL, 2017). In the discourse regarding the role of constitutional scholars, it is argued that 'the society itself increasingly expects greater and more pertinent contributions from academics' (Alemanno, 2022, p. 561), thus the CCs referring to scholars' work reflects society's expectations in some sense.

From its establishment (1992) to the date of the drafting of this the paper (31 January 2023), Romanian constitutional jurisprudence has counted 973 decisions allowing referrals of unconstitutionality. In 116 decisions, the word 'doctrine' was used, and in 32 the phrase 'specialist literature' was employed. Taking into account repetitive cases (with the same subject-matter or the same challenges) where the CC invoked its own case-law for the resolution of the case, the visible use (in terms of express mention) of the academic doctrine covers a quite significant proportion of these decisions. Compared with the Lithuanian example, where only several cases containing the word 'literature' or its synonyms were found, Romanian constitutional judges seem more confident with researchers' input into the development of constitutional jurisprudence. However, while in Lithuanian constitutional jurisprudence there are only some traces of evidence indicating that scientific research was consulted in the solution of constitutional justice cases, it cannot be ruled out that the real influence of the scientific doctrine is much larger. The study of case materials shows that the CC of Lithuania takes into account scientific research while preparing cases but does not refer to it in the final decision, and its impact remains latent. Therefore, it is not possible to determine the number of cases influenced by academics. The fact that scientific opinions are delivered in the preparatory stage of the case also allows us to confirm the interest of the

judiciary in academia. Taking into account all of this, the absence of explicit references does not jeopardise the ability of this research to verify the link between case-law and academic discourse.

In constitutional jurisprudence, the legal doctrine can be used in different parts of the constitutional text. It can be used not only by the CC itself in the establishment of the statement of reasons, but also by the parties to the case who express their viewpoints (Decisions of CC of Romania No. 66/1998, 1009/2009, 459/2014, 542/2015, 308/2016, 361/2016, 432/2016, 624/2016, 710/2016, 61/2017, 258/2017, 118/2018, 354/2018, 452/2018, 534/2018, 537/2018, 560/2018, 802/2018, 26/2019, 139/2019, 466/2019, 58/2020, 85/2020, 235/2020, 238/2020, 239/2020 (where the Government also refers to academic works), 643/2020, 648/2020, 776/2020, 875/2020, 907/2020, 69/2021) or by the judges who draft dissenting opinions, often more accurately than in the recitals of the decision, in the sense of referring to the author or work (Decisions No. 45/1998, 234/1999, 15/2000; 969/2007, 732/2009, 1202/2010, 748/2015, 759/2017, 297/2018 (also in reasoning), 136/2018, 518/2018, 26/2019, 504/2019 (also in reasoning), 818/2019).

When the legal doctrine is mentioned by the parties to the case and is reflected in the descriptive part of the constitutional decision, the scope for discussing the influence of academic works on the reasoning of the CC appears limited. Nevertheless, this enables the assertion that the CC, at a minimum, possessed an awareness of the referenced research. The opinions of the researchers which were consulted while preparing the case for the hearing and the statements of academics summoned to the hearing as part of the case material also find their place in the descriptive part of the decision. Their value and weight in the constitutional decision might be revealed when the CC decides to follow their path in the interpretation of the constitutional norms and the reasoning of the decision.

When expressly referring to the doctrine in holding part of the decision, both CCs of reference seem to prefer general expressions (such as ‘doctrine’, ‘specialised literature’ or ‘academic literature’), without specifying which authors or works are taken into consideration. The avoidance of the mention of specialised, and particularly national, authors or works is based on the (perhaps objectionable) idea of a certain level of neutrality, in the sense of not judging it by reference to or in favour of supporting one author/law school or another, and ignoring others. Such a strategy allows the anticipated justification of the choice of authors to be avoided. This might also be considered as representing willingness to show the general tendencies pursued in most of the academic works in the field, just as the CC of Lithuania pointed to the fact that the legal doctrine not only emphasises the tendencies of the regulation, but also discloses the particular legal regulation of foreign states (Ruling of 11 November 1998) or relies on ‘the constitutional tradition of Europe’, as the Court expressed itself (Ruling of 10 January 1998).

This position is supported by the example of the Belgian jurisdiction and the explanation of the president of the CC of Belgium, Jean Spreutels, given on the occasion of an international conference. Spreutels observed that the Belgian CC never cites the doctrine, a position explained by the aim of avoiding subsequent controversies where one author or another was used, or one theory or another was preferred or neglected. However, exceptions to the rule of not citing a particular author can found in the case-law of both courts, referring to foreign authors and their specific works (Ruling of 9 December 1998 of CC of Lithuania, analysed below, and Decision No. 683/2012 of CC of Romania).

On the other hand, there are examples of other CCs in which the doctrine is considered as a secondary source of law and is cited accordingly in their decisions (CC of Latvia, Judgement of 4 June 2021), sometimes in footnotes. This is also used in the practice of other courts – for example, the Supreme Court of the United States (*Dobbs v. Jackson Women’s Health Organisation*, 2022). These decisions seem neither more subjective nor less authoritative than those where the authors are not referred to; moreover, the path followed by the CC to the conclusion of the case is more transparent. This demonstrates that the lack of specification regarding the author or work might be considered as open to criticism. Comparative law can be a source of good practice, as at least the well-known examples of impactful court decisions accurately cite authors and the works they refer to.

As a compromise between explicit, precise referrals in constitutional texts and the tacit use of the wisdom of academics, the practice of the Constitutional Council of France of publishing on its website not only the

pronounced decision, but also a *Dossier documentaire* (2022) with the references used in the drafting of the decision might be considered. This may even be an alternative to citing the authors in the recitals, to the extent that the doctrine examined by the court would be accurately mentioned in the documentary file. Alongside this, one must note that the aforementioned might not be possible in cases in which the preparation for the case encompasses alternative solutions to consider along with their legal argumentation, which might reduce confidence in constitutional decisions.

Despite the constrained opportunity to delve extensively into the direct impact of academic literature on judicial decision-making, the recognition of such scholarly contributions underscores the court's engagement with prevailing academic discourse. This acknowledgment suggests a potential awareness of scholarly analyses and perspectives, which may inform the court's deliberations and interpretations, albeit mostly indirectly (not ignoring the classic sources of interpretation of constitutional provisions). As Williams (2002) points out, the authority of academics is 'rooted in their truthfulness in both respects: they take care and they do not lie'. Therefore, while the direct manifestation of academic influence may not be readily discernible within the court's reasoning, the court's familiarity with pertinent research signifies a foundational understanding of scholarly insights within its jurisprudential framework.

3. Levels of impact of the academic doctrine on judicial interpretation

Firstly, distinct from the use of the doctrine as an element with greater or lesser importance in the amalgam of the legal creation of the court's reasoning, the option for legal doctrines or philosophies that serve as methods of judicial interpretation might be noted. In this light, it is worth noting the use of a diversity of interpretive methods, sometimes conceptualised in the sense that the method used is specified, while other times it is applied without any thorough revelation in this regard. The multiplicity of methods of interpretation has become part of the official constitutional doctrine in Lithuanian jurisprudence, where it is explicitly stated that any method of constitutional interpretation is absolute and that in construing the Constitution, various methods of construction of law must be applied: systemic, as one of the general principles of law, logical, teleological, as one of the intentions of the legislature, as a precedent, historical, comparative, etc. (Ruling of 6 June 2006).

Thus, the CC's decisions might be founded: on a literal interpretation of the constitution (literalism),[8] via an originalist approach (originalism), using the works of the drafters of the constitution (who often themselves were academics), via inference from the general context of the adoption of the Constitution based on the settled case-law (the doctrinal approach, overwhelmingly found in decisions rejecting referrals in which the same criticisms regarding the same legal texts are invoked, but also present in admission decisions where, for the same reasons, similar legislative solutions are sanctioned (Toader & Safta, 2016), based on the weighing of competing interests, or in a systematic manner (structuralism, based on larger relationships within the Constitution). Again, the argumentation technique and the methods used seem to relate more to the profile of the judge-rapporteur/assistant-magistrate assigned to the case (the decision being, as a rule, a mirror image of the report or notes to the case) and not to a clear or coherent universal methodological approach of the CC.

From the perspective of the analysis in this paper, one of the methods that both the CC of Lithuania and the CC of Romania have conceptualised more clearly in the structure of the argumentation of their decisions, usually to substantiate or motivate jurisprudential upturns, is the so-called doctrine of living law or the living Constitution, giving meaning to constitutional dynamism, evolution, and the potential to adapt to permanent sociological changes. When social relations change, the content of legal norms also changes, regardless of the fact that they are not formally changed (Barak, 1989, p. 141). On this point, originalism and interpretivism might be even compatible with one another. This coexistence allows a balance to be created, granting the ability to keep the

[8] For a combination of methods see, for example, Decision of 11 December 2020: 'The Court considers that the phrase "autonomous administration and public institutions" contained in Article 136 (4) of the Constitution cannot be interpreted exclusively literally, ad litteram, especially in the context of the evolution of the socio-economic life after 2003 – the year of the revision of the Constitution (in this sense it is relevant, for example, that many of the former autonomous administrations were reorganised and became national companies), but the spirit of the law must be taken into account, namely the intention of the framer, that the right of administration over the public property belongs to a State entity or over which the State can have control.'

Constitution stable: originalism prevents courts from deviating from the initial constitutional sense, while interpretivism ensures the flexibility and adaptability of the Constitution to the changing social reality, without interfering directly with the text of the Constitution. The idea of a living constitution is not just a matter of constitutional law theory. Since the *Weems v. U.S.* case in 1910, this conception has been widely accepted and applied both at the level of CCs (Safjan, 2006) and supranational courts (*Soering v. the United Kingdom*, 1989; *Pretty v. the United Kingdom*, 2002). The concept of a living Constitution surely opens the door for different sources of interpretation of constitutional norms vis-à-vis the current conditions, including referral to academic works.

The analysis of the constitutional jurisprudence of the jurisdictions chosen for this research reveals that academic research and the legal doctrine appear as a source of inspiration for the interpretation of legal regulation (for instance, contributing to explaining theoretical notions or institutes) or the formulation of new concepts not yet revealed, offer support for judges' reasoning, serve as an objective benchmark, and supply guidance alongside the court's own case-law or that of other CCs, the European Court of Human Rights, or the Court of Justice of the European Union. The latent use of scholarly works is more difficult to detect and prove; however, when academic opinions are requested, it might be presumed that the other works of other academics are also analysed. This research does not provide an exhaustive set of decisions where the impact of academic research might be detected, but rather introduces the most typical examples of how the constitutional jurisprudence evolved in each country as a result of indirect cooperation between researchers and the courts.

3.1. The legal doctrine as an ally of the CC of Romania

3.1.1. The role of explaining the legal concepts used

In many decisions of the CC of Romania, the invocation of the doctrine appears when the meaning of certain legal concepts used in the recitals is presented, with the doctrine being used to facilitate the understanding of the legal concepts. The Court uses doctrinal terminology, definitions, characterisations and classifications when it refers, for example, to: the 'traditional administrative litigation institutions, referred to in the doctrine as administrative litigation and administrative guardianship' (Decision No. 137/1994); principles such as 'nominalism' (Decision No. 62/2017) or 'the majority decides, the opposition expresses itself' (Decision No. 442/2014, Decision No. 137/2022); legal concepts such as adversariality (Decision No. 641/2014; Decision No. 404/2022); sanctions in civil procedural matters (Decision No. 377/2017); the defendant's status in the administrative litigation trials (Decision No. 889/2015); judicial precedent (Decision No. 838/2009); 'national security' (Decision No. 91/2018); taxes and fees (Decision No. 900/2020); 'public official' and 'official' (Decision No. 2/2014); procedural deadlines with reference to the use of appeals (Decision No. 501/2016); 'court' (Decision No. 21/1995); 'incompatibility' (Decision No. 87/2019); 'decentralized public services' (Decision No. 1257/2009); the phrase 'set of relationships regarding the social coexistence' used by the criminal law (Decision No. 451/2018); 'through other places than those established for customs control' within the regulation of black market crime (Decision No. 176/2022); the concept of judicial individualization of the sanction (Decision No. 536/2016; Decision No. 582/2016); the competent courts within the procedure of annulment of a document (Decision No. 166/2015); the characterisation of a measure on asset confiscation (Decision No. 356/2014); the difference between phrases such as 'damage caused' and 'claims of the civil party' (Decision No. 867/2021); or the characterisation of the right of appeal (Decision No. 244/2017).

As a rule, these decisions are established by starting from specifying the legal framework including the impugned norm or legislative solution, in relation to which the CC of Romania then establishes its constitutionality analysis. In these types of decisions, the doctrine does not seem to assume 'weight' in the decision-making process in terms of the argument on which the constitutional judge relies, instead being used in an explanatory role to specify the normative context.

3.1.2. The premise of the objective benchmark of constitutional reasoning

In a register of examples of higher valorisation of the doctrine, the decisions in which the CC of Romania uses doctrinal explanations, definitions, developments of certain legal notions or concepts are entered, placing them

in the position of premises of reasoning. This means that the doctrine appears characterised, along with the case-law, as representing an objective benchmark. The key difference here is emphasised in the sense of the weight of the doctrine in the reasoning of the constitutional judge. The doctrinal assessment, forming a common body with the interpreted legal norms, substantiates the assessment of the constitutionality of the norm that takes account of that interpretation, taking the doctrine as its ally more or less explicitly.

Thus, the CC of Romania held in one case that the legislator used a phrase in the regulation protecting social relationships regarding occupational health and safety, namely 'special consequences', the definition of which is not disclosed in the law nor the judicial doctrine nor the case-law, observing that this 'in the matter developed an enshrined meaning for the impugned concept that would establish *an objective benchmark according to which its content could be assessed* [emphasis added]' (Decision No. 513/2017). *Per a contrario*, is it possible to consider that if the doctrine had developed an enshrined meaning of the criticised phrase, the legislator's intervention to define it would no longer have been necessary, and therefore the criticisms would have lacked support? It can be considered that, rather, a difficulty encountered in the doctrine is emphasised, which seems to be used as a decisive argument for ascertaining the unconstitutionality of the norm criticised for its lack of clarity and precision.

A similar assessment seems to result from another decision in which, analysing the drafting of a text from the civil procedure regarding the provision of the solution to the parties through the mediation of the court registry, the CC held that the academic doctrine can sometimes disclose a constructive critical review of the actions of legislator.[9]

In one decision, the CC begins from the premise of the fact that while interpreting the Civil Code of 1864, both the doctrine and the practice recognised the possibility of applying the theory of unforeseeability in the event that an exceptional case outside the will of the parties that could not reasonably be foreseen by them at the date of the conclusion of the agreement would make the enforcement of the debtor's obligation excessively onerous (Decision No. 623/2016). In another case, the Court started from the premise established in the doctrine regarding the qualification of a procedural term regarding the reasoning of their decisions, a decisive premise in the guidance of the CC of Romania's solution which derived, *inter alia*, from the doctrine.[10]

In other cases, the CC supports its reasoning by bringing the doctrine as an argument or ally – for example, when it confirms a court's statement[11] or when it notes that 'the doctrine allows the existence of positive discrimination, even regulated by certain constitutional texts, which impose certain social protection measures' (Decision No. 646/2020). Although the wording is rather imprecise, one notes an authority recognised by the doctrine equally regarding the interpretation of the constitutional texts.

The doctrine may appear to be placed in line with the case-law of the courts or even with greater authority, in the sense that the latter was established on the doctrine, as was explicitly held in a decision by which the CC of Romania argued that

> both in doctrine and in practice the courts were asked what can be done in situations where there is a legal impediment that makes it impossible to pronounce a criminal judgment for establishing these crimes. The solution, foreseen by the legal literature and appropriated in the case-law, was that the determination of the commission of the crimes should be made by the review court itself. (Decision No. 66/2008)

[9] The CC of Romania has held: 'the doctrine of the civil procedural law itself was surprised by the limitation of the assumptions in which this means of communicating the decision was regulated by way of exception only in the case of postponement of the pronouncement regulated by Article 396 (2) of the Civil Procedure Code' (Decision No. 454/2018).
[10] The CC stated that: 'the decision shall be drawn up within 30 days at most from the pronouncement … . The judicial practice and doctrine have ruled that the mentioned term is a recommended term' (Decision No. 233/2021).
[11] When the CC 'finds that the adoption of the law, as part of the legislative process, refers to the final vote exercised by the Parliament on the whole law. In this regard, both Romanian and foreign legal doctrine is pronounced' (Decision No. 730/2017).

In certain cases, the CC emphasises that it established its case-law based on the doctrine.[12] At other times, the Court places the doctrine in line with its own case-law (which is generally binding), such as when it notes, for example, that 'both the specialised doctrine and the case-law of the Constitutional Court … are in the sense that the limits of the referral to the Parliament for the re-examination of the laws shall be defined by the request for re-examination' (Decision No. 30/2016; Decision No. 31/2016).

Likewise, the CC of Romania brings the doctrine as an ally when formulating recommendations, which denotes, again, the special authority given to it, as in one case in which the Court held that its decision to procced to the re-examination of the law as a whole, which would answer all of the observations formulated, was determined by the criticisms of that law expressed in the doctrine with reference to some of its provisions (Decision No. 472/2008), which meant, as it can be understood, that the legislator must also respond to the observations of the doctrine.

3.1.3. Reasoning closely guided by the doctrine

While in the previous section decisions established on a qualitative criterion involving the weight of the doctrine in the motivation were considered, within this section a quantitative criterion is added. The examples selected in this section differ from those in the previous sections in that the doctrine marks the reasoning, serving as a blueprint or supporting structure on which the Court then develops its recitals.

For example, in the decision by which it found that the legislative solution contained in Article 118 of the Code of Criminal Procedure, which does not regulate the right of the witness to remain silent and not to incriminate oneself, is unconstitutional (Decision No. 236/2020), the CC of Romania used doctrinal references in paragraphs 25 (the *ultima ratio* principle in criminal matters), 36 (the Court held the doctrinal opinions according to which the right to remain silent and the right not to contribute to self-incrimination derive from the observance of the presumption of innocence, being guarantees of it), 61 (cited the doctrine), and 73 (where it emphasised the unanimity of the case-law and the legal doctrine, stating that the obligation of finding the judicial truth is imposed on a judicial body that on the basis of the evidence with respect for the fairness of the procedure, regarding the facts and circumstances of the case, etc., should find the proper solution). In the same decision, the doctrine was also invoked in the dissenting opinion.

Similarly, the CC of Romania also established its reasoning in a decision by which it found that the provisions of Article 5 of the Criminal Code are constitutional to the extent that they do not allow the combination of the provisions of successive laws in the establishment and enforcement of the more favourable criminal law – a decision also extensively debated, which placed the CC of Romania in a position opposite to that of the High Court of Cassation and Justice (Decision No. 265/2014). Thus, the CC proceeded to its analysis, noting in paragraph 23 that 'in the specialised doctrine and the judicial practice, two opinions were expressed regarding the enforcement mechanism of the more favourable criminal law'. It then continued in paragraphs 24–26 to develop doctrinal opinions, identifying in paragraph 28 the majority doctrine before referring in paragraphs 35 and 46 to the notion of 'autonomous concepts' with reference to its doctrinal enshrinement. In paragraph 49, based on the arguments presented on the violation of certain constitutional texts, it concluded that 'since by combining the criminal provisions from several successive laws, a third law is created, judicially, which denies the rationale of the criminal policy formulated by the legislator'. Accordingly, it then considered that 'only the interpretation of the provisions of Article 5 of the Criminal Code in the sense that the more favourable criminal law applied in its entirety is the only one that can remove the flaw of unconstitutionality'.

Another decision by which the CC of Romania sanctioned the provisions of Law No. 78/2000 on preventing, discovering and sanctioning corruption offences for lack of clarity and precision is established on a veritable 'red line' of doctrine, which is mentioned in nine of the paragraphs of the statement of reasons (Decision No. 458/2017). To the same effect, other examples (Decision No. 302/2017; Decision No. 392/2017; Decision No.

[12] The Court argued that 'in the case-law of the constitutional court, making use of what was retained in the doctrine, the content of Article 136 (2) and (3) of the Fundamental Law was defined, by reference to the provisions of the Civil Code, under the aspect of the normative act …'. (Decision No. 406 /2016)

405/2016) can be given in which the judge allowed themselves, practically, to be guided by the researcher, thus becoming a partner in the reasoning of the court's decision. This is the most visible way in which the doctrine exerts its influence on judges who, resorting to the authority of theoreticians in the matter, substantiate their reasoning for their solutions.

Perhaps these decisions are best suited to the comment of a renowned Romanian professor, according to whom 'the chorus of two voices – of case-law and, respectively, doctrine – has often been celebrated, but in the end only their meeting and confusion on the lasting common notes of the legal progress managed to discern and impose the norm' (Duțu, 2022b), in this case managing to lead to the admission of a solution that will result in the amendment of the legislation.

3.2. Academic input in the development of Lithuanian constitutional jurisprudence

3.2.1. The source of interpretation of impugned legal provisions

References to the academic doctrine, especially when they are used in moderation, as in the case of the CC of Lithuania, serve as indicators that, within judicial discourse, scientific literature plays a specific role in aiding the CC to delineate the substance of a legal norm, unveil intricate legal phenomena, and introduce novel principles inherent to specific branches of law, otherwise there would be no need to call on it. This level of impact of the academic doctrine when it is invoked while interpreting ordinary legal legislation is similar to the explanatory role of the legal doctrine previously revealed in the Romanian example. Through such references, the court not only acknowledges scholarly contributions, but also leverages these insights to refine its understanding of legal principles. In essence, the incorporation of the academic doctrine underscores the court's commitment to drawing upon scholarly expertise to inform its deliberations and shape the trajectory of the interpretation of ordinary laws given by the CC.

Especially in the early years of the activities of the CC of Lithuania, judges searched for understanding in the academic doctrine to the new concepts enshrined in the law. In the ruling on land reform (Ruling of 19 January 1994), the Court was compelled to elucidate a definition of what program laws are, and referred to research and foreign regulation in a very general manner without going into specifics (or distinguishing one from the other), holding that 'in legal science and in legislative practice of other states, the so-called program laws are well-known'. Taking the definition of program laws as well as the method of their functioning from those sources (Ruling of 14 February 1994), the Court had to explain issues of the validity and compliance of legal acts adopted earlier with the new Constitution. Similarly, the Court turned to the science, stating that 'various legal means of settling this issue are known in legal science as well as in history' while being willing to emphasise that several solutions to the compatibility of earlier legal regulation with the Constitution might be found, and these solutions were described in the continuation of the ruling, allowing discretion to the legislator to choose the most appropriate approach.

Another example of the interpretation of a notion enshrined in the law with a constitutionality that was challenged by making reference to the science can be found in the ruling of 6 December 2013 on the liability of the possessor of a potentially dangerous object. The CC explained what is understood as an object of increased danger and referred to the 'civil law' (which cannot be confused with the legislation concerning civil law, as the legislation was to be interpreted). The reference to the jurisprudence of the Supreme Court of Lithuania followed the civil law doctrine, serving as the confirmation of the former (taking the priority position in the rank of sources of interpretation).

The CC of Lithuania also drew upon legal doctrine (in terms of civil law, criminal law, etc.) pertaining to the content of the subjective right of the owner (Ruling of 23 June 1999) and tenant of a dwelling unit (Ruling of 15 June 1994), qualifying features of crime (Ruling of 4 June 2012), criminalisation or decriminalisation of deeds, purpose of punishment under comparative criminal law (Ruling of 13 November 1997), etc.

The abovementioned ruling of 6 December 2013 on a potentially dangerous object contains another interesting passage, this time not in the part where the challenged legal regulation is interpreted, but in the constitutional

reasoning. While assessing the constitutionality of the impugned legal norm, the CC referred to the principle of civil law, which did not exist in the official constitutional doctrine. Therefore, one cannot argue that it stems directly from the Constitution, and as such it was never used again in any other case. The principle of *bonus pater familias* determining the duty to behave in a reasonable, wary, and careful manner was used as an argument to explain the case in which the guilt of the possessor of a potentially dangerous object arises. Yet this revelation leads the research to the next section, where the impact of academics and researchers might be detected in the development of official constitutional doctrine having the power of the Constitution itself.

3.2.2. The inspiration for the interpretation of underdeveloped constitutional aspects and the invisible though undeniable use of academic sources

References to the legal doctrine that might have impacted the development of constitutional jurisprudence are usually provided in the part of the ruling where the CC gives their interpretation of constitutional provisions or in the part where the constitutional reasoning is construed. One has to admit that such cases are quite exceptional; however, they are no less compelling due to the significance of these references made by the court. Mostly, these references appear when a new constitutional concept has to be developed. Naturally, references, almost always in a general form, are more likely to be found in earlier constitutional jurisprudence, as all constitutional shape has to be built on empty ground. The court refers to the academic doctrine or a particular field of law (presuming, as the context allows, that it concerns literature and not the legislation) as an introduction to a new development or serving as the background to the formulation of official constitutional doctrine.

A tribute to comparative constitutional law is paid in the ruling of 10 January 1998, revealing for the first time a form of Lithuanian state. This ruling is considered one of the most significant in Lithuanian constitutional history, and is studied in detail in academic works (Kūris, 1998). While explaining the system of state power institutions, the CC of Lithuania relied on the forms of states developed in comparative constitutional law (‘in comparative constitutional law various forms of state governance are known’), distinguishing that, ‘as a rule, republics are categorised as parliamentary, presidential, and thus termed mixed (half-presidential)’, while also looking at the reasons for the particular choice of a certain form of state (‘the variety of forms of state governance has been determined by national, historical, political and cultural traditions’). The Court continues then on the different models of forming a government, and the reader maintains the impression that this is the research of someone else (without particular indication) and not the interpretation of constitutional provisions. Having assessed all the possibilities, the Court concludes that the Lithuanian Constitution determines the state of Lithuania as a parliamentary republic with certain peculiarities, thus termed a mixed (half-presidential) form of governance, and that this stems directly from the Constitution. Thus, the preceding paragraphs come from the external sources, most likely from academic works.

In the ruling on state service, the CC of Lithuania formulated an exhaustive official constitutional doctrine on state governance and determined the constitutional concept of state service (Ruling of 13 December 2004). While doing so, the Court, among other things, noted that ‘no single, universally recognised concept of the state service exists in the scientific literature on law, political sciences or public administration’, and then proceeded to the revelation of aspects related to state service and the requirements for it. The introduction stemming from the ‘scientific literature’ in a way enabled the Court to develop the official constitutional doctrine, stating that in this field the legislator has broad discretion to choose and consolidate in laws a certain model of organisation of state service. Would the new constitutional doctrine have been so exhaustive if the Court did not perceive that there was a lack of discourse on this topic in the scientific literature? In any case, it filled this gap and allowed researchers to work on it later in academic studies.

Interestingly, the statement about the absence of the notion of state service in the scientific literature was used also in another case (Ruling of 20 March 2007) quoting the previous example. This led to the continuation of the formulation of the constitutional doctrine of state service and the remuneration of state servants.

There are also cases of the invisible use of the academic doctrine, which are no less significant than those where explicit references are made. These cases are more difficult to detect, as readers have to be familiar with both the doctrine and the ruling (and even the circumstances of its adoption). However, when the new official

constitutional doctrine goes hand in hand with established academic opinion and theory, it is hardly believable that the academic research was not among the material of the case during the preparation stage – even if the final text is tacit about the doctrine. As a rule, scientific opinions are also usually requested in such cases containing references to the academic works themselves. This is another factor, besides direct search via keywords, that allows us to detect and analyse rulings influenced by scholars. As a general rule, the scholars are referred to in the constructive part of the ruling; they will never be referred to while construing the official constitutional doctrine or argumentation. However, their impact might be visible, sometimes even in an expression used by the CC.

A perfect example of this is the ruling of the CC of Lithuania on the requirement that a cassation appeal must be drawn up by an advocate (Ruling of 30 December 2021). While interpreting constitutional provisions related to the right to court and to the judicial system enshrined in the Constitution, the CC explained the nature and purpose of a cassation procedure and its differences from the other stages of a trial by using almost the exact words found in scientific articles or textbooks. For example, the development that 'only on fundamental legal issues in order to ensure, inter alia, the public interest in the uniform interpretation and application of law and the formation of uniform (coherent, consistent) case law' is almost the same wording as that which might be found in several scientific articles (e.g., Stripeikienė, 2010; Nekrošius, 2006). The fact that the researchers' opinions were requested in this case also points to the efforts of the judge rapporteur to become acquainted with the academic background of the case.

The impact of researchers' opinions on the formulation of constitutional doctrine might also be assumed in a recent case that serves as one of the numerous examples in which prominent lawyers from different universities were summoned to express their views concerning a case. In the ruling of 1 March 2019 on the right to apply to a court of appeal instance without the assistance of a lawyer, scholars unanimously rejected the requirement to address a lawyer for drafting an appeal. Unsurprisingly, the verdict of the CC of Lithuania was to repeal the relevant provision of the Civil Code. Similarly, in the ruling of 24 February 2017, the concept of impeachment proceedings enshrined in the Seimas Statute was interpreted while taking into account the explanations of scholars who presented their opinions, although in the reasoning the CC spoke as if from itself.

3.2.3. Exceptional methods of reasoning for exceptional cases

The role and mission of the CC, being the supreme guardian of the constitution, sometimes makes it the last resort in resolving difficult, sensitive issues that cannot be dealt with by the legislator because of the lack of political will or the presence of political disagreements. Litigation is often brought before the CC, which is composed of "*les sages*" whose decisions cannot be doubted as they have the power of the constitution itself. Such cases are not related to a particular timeframe, but rather to the social reality of the state. When faced with such a crossroads, the CC uses all of the instruments it can find to substantiate its reasoning for solutions that might be met with hostility in some parts of society. There, academics might become sources of answers and partners to support a chosen solution.

One of the most commonly referred-to rulings of the CC of Lithuania concerns the abolition of the death penalty (Ruling of 9 December 1998). At the moment at which the decision should have been taken (as it was one of the informal conditions of joining the EU, which was Lithuania's chief desire after regaining independence), society was divided, Parliament could not find the courage to amend the provision, and the issue was left to the Court. Therefore, knowing that all arguments for and against had to be discussed and the ruling should be as convincing as possible, while construing the Constitution in decision the Court relied on different theories developed in the academic doctrine. Here the Court emphasised trends from the doctrine of criminology concerning the use of different measures intended for the reduction of crime, and used trends from the doctrine of criminal law describing the essence of punishment, the degrees of its severity and the impact on the person who committed the crime, even citing its general principles: 'The modern theory of criminal law, however, categorically dissociates itself from the talion principle (an eye for an eye, a tooth for a tooth) which existed in ancient societies and states.' In this case, passages of the legal doctrine were literally used as extra arguments to prove the unconstitutionality of the impugned norm, bringing together the constitutional spirit and the concept of legal theory. However, no clear indication as to the authors of these academic doctrines were provided in the

text of the constitutional ruling.

This is not the only insight that this case brings to the topic of this research. Paraphrasing the famous proverb, one might note that exceptional cases call for exceptional measures, as in this case a reference to the particular research work and another particular author were given. After discussing the role of severe punishments in the experiences of foreign countries, the CC made explicit reference to the source of this information, indicating a recent Lithuanian publication entitled "Crime and the Activity of the Institutions of Law and Order", with specific pages in which the relevant information could be found. Perhaps more surprisingly, the Court referred to the specific author – Cesare Beccaria, a classic of criminal law, as the Court called him – and his revelation regarding capital punishment, that 'severe punishments make society itself more severe'. After reading this, one might not need any further evidence of how academic research can enrich constitutional jurisprudence. While referring to particular publications, the judges of the CC of Lithuania did not show themselves to be any less competent regarding their knowledge of how to resolve the case; on the contrary, they proved that all relevant sources of information were considered while searching for solutions, and the legal heritage was taken into account.

Unfortunately, this one of only very few examples of the CC paying tribute to particular scientists' works, proving that the Court prefers not to indicate its sources while researching material relevant to a case.

Moreover, one might agree that similar structures of constitutional reasoning are rather an exception, and are more typical (if they still exist at all) of early jurisprudence, when the official constitutional doctrine had not yet been so extensively developed. Now, 30 years after the establishment of the CC of Lithuania, this practice is extremely rare, or perhaps an appropriate case in which the need to again rely on researchers has not yet been examined.

Conclusions

The impact of the academic doctrine on the development of constitutional jurisprudence might be determined by assessing different aspects: the formalisation of prior research; the selection of the relevant academic doctrine; the mode of its reflection in the final text, starting from its insertion in the recitals; or the citation, or lack thereof, of the selected authors or works. The legal tradition and the custom practice of the CC allows the visible and invisible use of the scholarly doctrine to be distinguished in constitutional judgements. Despite variations in the forms of its appearance, the influence of academic research on constitutional developments is obvious.

The extent of the influence exerted by the academic doctrine on the evolution of constitutional jurisprudence is contingent upon several factors, such as the amount of pre-existing constitutional doctrine, the need to develop novel concepts within the contexts of specific cases, the sensitivity of the problem analysed and the need for additional convincing support, etc. The analysis of both Romanian and Lithuanian constitutional case-law allows us to note that judges are more willing to resort to the doctrine (whether explicitly or implicitly) when dealing with new or more complex issues. The number of references found in constitutional texts differs, whether due to the different numbers of decisions on constitutionality adopted in general (the CC of Romania, which sits in panels, decides on twice as many decisions on the merits as the CC of Lithuania, where all cases are heard by the entire composition of the Court), different constitutional traditions (mentioning or not mentioning all sources used), the need to consolidate the decision adopted, etc.

Therefore, the use of academic works in constitutional reasoning allows the famous phenomenon of the 'migration of constitutional ideas' (Choudhry, 2007) to be expanded to include transmission not only from jurisdiction to jurisdiction, which is certainly nothing new, but also from the academic world to the judicial dimension. The inverse is also true, as constitutional decisions often become material to analyse and from which to generate new scientific revelations. The theoretician appears as a partner of the judge, and their credibility and reputation support the credibility of the judge's decision. In this way, even if consulting the academic legal doctrine is not mandatory, it is imposed by the persuasive power of the reasoning on which a decision rests. On the other hand, the judge's work can serve as an inspiration for academic research.

The role of both the judge and the legal researcher in ensuring the evolution of law and legal certainty, creating a 'well-functioning constitutionalism' (Tushnet, 2016, p. 108), acquires new approaches. To some extent, both judges and researchers have a role as mediator or creator in interpreting and updating the law, understanding the law and adapting it to the evolution of the society. Judges and researchers alike cannot be ignorant or passive, and must be aware of the mutual support that they can provide and the significant advantages of coordinating their efforts.

Another facet of the doctrine-case-law partnership refers to researchers' need to know that their work is necessary, recognised and produces effects on the evolution of the legal system. Of course, this conclusion imposes responsibility, accountability and adherence to academic ethics, but it also creates an optimistic view of their work and its valorisation. High-quality research increases the quality of case-law, and the authority thus acquired by the latter increases the chances of the former being recognised as an informal source of law.

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