

## SOME ASPECTS OF THE CONSTITUTIONALITY OF LAWS CONF CONTROL

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### Abstract:

*The Constitution is the fundamental law of a State, its supremacy is ensured by a special and complex mechanism called the control of the constitutionality of laws. For this purpose it was created an effective mechanism resulted in a legal institution called review the constitutionality of laws and that includes all procedures that ensure the supremacy of the Constitution. The notion of control of constitutionality of laws means all methods through which the verification of compliance with constitutional law. It is a competent body to determine non-compliance of the law or provisions of law with the Constitution different from a constitutional system to another, how to regulate fundamental relations and constitutional tradition, determining each state agency to achieve constitutional justice. Constitutional practice were imposed two forms of constitutional law control: control by a court, known as the American model and control system or a particular unique and specialized body system called the European model. Romanian constituent legislature opted for the European model of control of constitutionality of laws, assigning it a special and specialized control, called the Constitutional Court. Political-judicial body, the Constitutional Court of Romania consists of nine judges, three appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania, for a term of nine years. Under the European model of constitutional justice, the law provides exclusive Constitutional Court the constitutionality of laws in matters.*

**Keywords:** Law, judicial review of laws, the supremacy of the constitution, European model of control, the Constitutional Court.

**JEL Classification:** K10

### 1. GENERAL ASPECTS

State law requires the rule of law. Exercise of political power should be within the limits set by law respecting human rights and fundamental freedoms. Law must be the expression will, otherwise it can not generally impose respect. The Constitution is above the law, fundamental law of the state, whose supremacy must be ensured by a special mechanism, otherwise it remains the value of a simple law. For this purpose it was created an effective mechanism resulted in a legal institution called review the constitutionality of laws and that includes all procedures that ensure the supremacy of the Constitution. The notion of control of constitutionality of laws means all methods through which the verification of compliance with constitutional law. Competent body to determine non-compliance of the law or provisions of law with the Constitution are different from a constitutional system to another, how to regulate fundamental relations and tradition determining each state agency to achieve constitutional justice. It is noted that in countries with flexible constitutions fail to issue the constitutionality of laws, i.e. their conformity with the constitution. This is because under such a system, which introduces an otherwise constitutional law does not constitute a breach of it, but a change in her (1).

By contrast, in countries with rigid constitution "written constitution is endowed with a superior legal force because ordinary laws that she can always change them, but they can not be changed"(2)

## 2. FORMS OF CONTROL THE CONSTITUTIONALITY OF LAWS

Control of the constitutionality of laws is a complex legal institution aimed at checking compliance with laws and other normative constitutional. Control is achieved by a public authority expressly vested by the Constitution with such control. Constitutional practice were imposed two forms of control of the constitutinality of laws: control by a court, known as the American model and control system or a particular unique and specialized body system called the European model.

American system has in turn two forms:

- a) when control is focused on constitutional and is exercised only by the Supreme Court.

Called centralized control, "this control feature is like that, regardless of the controlling body of constitutionality, this body has monopoly control" (3)

- b) diffuse control, that control is performed by any judge court in the country. Decentralized control, as it is known that control, is also judicial review of constitutionality and is characterized in that the law can be declared unconstitutional by all the judges acknowledged" (4)

The first control (concentrated) gives greater authority and take decisions usually effects erga omnes. The second control (speaker) is limited to one issue, and now current and in its decisions have a relative authority in that it take effect only between the parties and may be extended, at most, by way of judicial precedent (5).

European control system involves the constitutionality of laws, creating a special agency that specializes in conducting the review to rule on the constitutionality of the law or they violate constitutional principles, but without opportunity to amend or add to them, i.e. without legislative competence.

In the literature, classification forms of constitutionality control laws has other criteria also.

Thus, giving of the controlling bodies, we have:

- a) the control exercised by a political body, in this case is a special body appointed, but on political considerations to penalize non-compliance with the Constitution Act,
- b) the control exercised by a body judicial control is achieved by courts,
- c) the control exercised by a political-judicial body, usually the Constitutional Court.

Political character of the body resulting from the designation of members of the Court, that are appointed on political and judicial nature is given the powers which the Court has the control of constitutionality of laws, the procedure to be followed before it and the nature of the solutions given.

Another classification criterion is when control is exercised as follows:

- a) before control is exercised before the law is promulgated,
- b) back control is the control exercised after the entry into force of the law.

One opinion (6) states that constitutional practice of democratic states have developed degrees of intensity of the constitutional control of different laws, namely:

- lack of control (eg, Netherlands, United Kingdom)
- a weak constitutional scrutiny (eg Sweden, Norway)
- a constitutional control environment (eg, Spain)
- a powerful constitutional scrutiny (eg, Germany, Hungary).

The same author states further that the impact of constitutional review depends on the strength and frequency of its use by courts, especially the Supreme Court and Constitutional. Constitutional Court was established for the first time in 1920 in Austria and Czechoslovakia, but control of the constitutionality of laws rooted in U.S.A. being established by a decision of the Supreme Court in 1803 regarding case Marbury vs. Madison. The Court decision states that "without doubt, those who prepared the written Constitution they designed as the fundamental and supreme law of the nation, and therefore, any principle of governance must be such that a law of Parliament contrary to the Constitution is void" (7).

The doctrine states that in this way was born the American model of control of constitutionality of laws (8).

Control of the constitutionality of laws, regardless of its type, is an important tool in ensuring supremacy of the Constitution. However, extending the control of constitutionality of laws in most countries of the world is proof of its effectiveness in the order of a state constitutional.

### **3. CONSTITUTIONALITY OF LAWS CONTROL IN ROMANIA**

In Romania, the legislature opted for setting up the European model of control of constitutionality of laws, assigning it a special and specialized control, called the Constitutional Court. This institution was established by the Constitution of Romania in 1991 and according to constitutional text - Article 142. 1 - is the guarantor of constitutional rule. Also, the Constitutional Court is the sole authority of constitutional jurisdiction in Romania, being independent from any public authority and obeys only the Constitution and law on its organization and operation (9). Constitutional Court provides constitutional control of laws, international treaties, regulations and orders of Parliament Government finds out acts unconstitutional provisions when they violate constitutional provisions or principles, but also decides on the constitutionality of provisions of that before, without to amend or supplement provisions controlled.

Romania's Constitutional Court is a political-judicial body. Its political nature resulting from the designation of members of the Court: three judges are appointed by the Chamber of Deputies, three by the Senate and three by the President of Romania (Article 142. 3 of the Constitution) and is given the judicial nature of the powers which the Court has the control of constitutionality of laws, the procedure to be followed before it and the nature of the solutions given.

Constitutional reform in 2003 strengthened the role of the Constitutional Court as a defender of the rule of law while outlining more clearly his position in the system of state bodies (10).

Amendments and constitutional provisions governing the Constitutional Court are the result of "turning a decade of activity of the Constitutional Court and seek to increase its effectiveness as a guarantor of the supremacy of the Constitution, the constitutional control" (11). According to Article 146. 1 point. d) of the Constitution, the Constitutional Court "decide on objections of unconstitutionality of laws and ordinances, brought before the courts or commercial arbitration; exception of unconstitutionality can be raised directly by the Ombudsman".

Article, in its new wording, makes two significant changes: a) the objection of unconstitutionality of a law or ordinance can be waived and courts of arbitration not only of the court, as provided in the old wording, b) the objection of unconstitutionality can be brought up directly by the Ombudsman.

Exception of unconstitutionality before the court or commercial arbitration can be invoked by either party and the court process in motion and the prosecutor in cases involving. As regards the Ombudsman, the objection of unconstitutionality by invoking it is done directly before the Constitutional Court.

Under Article 25.1 of Law 47/1992, republished and amended, the Court decide on exceptions directly by the Ombudsman, and in paragraph 2 of that article states that the procedure for resolving the objection of unconstitutionality raised in the courts properly apply in this case. Unconstitutionality of a law or an order may be raised before the courts and commercial arbitration, unless it depends on resolving the case. May not be the objection of unconstitutionality of provisions of law or constitutional order which was established by the Court or the provisions of state law or ordinance, a previous decision as unconstitutional.

Law Review has made a significant change and the decisions of the Constitutional Court handed down at the settlement of unconstitutionality and the provisions of existing law or ordinance was declared unconstitutional. Thus Article 147. 1 of the Constitution requires the Parliament or

Government, as appropriate, to agree with the unconstitutional provisions of the Constitution. If that requirement is not met, the provisions found unconstitutional ceases legal effect 45 days after publication of the Constitutional Court decision. During this time provisions are suspended as shown. Shown by the new constitutional provision were removed "questionable and confusing situations, possible under the earlier empire drafting the Constitution, the public authorities could overlook or even reject the Court's decisions" (12).

Some aspects of control of constitutionality of laws presented are meant to contribute to the understanding and knowledge of this mechanism, but also emphasize the importance of ensuring that the Constitution and its rule. Whichever approach is adopted constitutional control of the legislature constituted for this type of control is to guarantee rights and freedoms and to prevent exceeding the constitutional limits of public authorities.

## ENDNOTES

- (1) T. Drăganu, Drept constituțional și instituții politice – Tratat elementar, vol. I, Ed. Lumina Lex, București, 1998, p.291.
- (2) Ibidem
- (3) Deleanu, Drept constituțional și instituții politice – Tratat – vol.I, Ed. Europa Nova, București, 1996, p.300.
- (4) Ibidem
- (5) I. Deleanu, Justiția Constituțională, Ed. Lumina Lex, București, 1995, p.24.
- (6) A. Lijphart, Modele ale democrației. Forme de guvernare și funcționare în treizeci de țări, Ed. Polirom, Iași, 2000, p.211.
- (7) O. Tinca, Constituții și alte texte de drept public, Ed. Imprimeriei de Vest, Oradea, 1997, p.702.
- (8) M.J.C. Vile, Constitutionalism and the separation of powers, Liberty Fund, Indianapolis, 1998, p.85.
- (9) Legea nr.47/1992 privind organizarea și funcționarea Curții Constituționale, republicată, așa cum a fost modificată prin Legea nr.232/2004 pentru modificarea și completarea Legii nr.47/1992.
- (10) C. C. Cîlinoiu, V. Duculescu, Drept constituțional și instituții politice, Ediție revizuită și completată, Ed. Lumina Lex, București, 2005, p.237. Curtea Constituțională este un organ de stat, regulile juridice privind constituirea, organizarea, funcționarea și competența sa confirmând fără tăgăduire această concluzie – G. Vrabie, Organizarea politico-etatică a României, Drept constituțional și instituții politice, vol.II, Ediția a treia revizuită și reîntregită, Ed. Cugetarea, Iași, 1999, p.334.
- (11) M.Constantinescu, I.Muraru, A.Iorgovan, Revizuirea Constituției României – Explicații și comentarii, Editura Rosetti, București, 2003, p.126.
- (12) I.Muraru, E.Simina-Tănăsescu, Drept constituțional și instituții politice, vol.II, Ediția a XI-a, Editura All Beck, București, 2004, p.280

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4. I. Deleanu, Justiția Constituțională, Ed. Lumina Lex, București, 1995.
5. L. Dragne, Drept constituțional și instituții politice, vol.I, Ed. Universul Juridic, București, 2009.
6. T. Drăganu, Drept constituțional și instituții politice – Tratat elementar, vol. I, Ed. Lumina Lex, București, 1998.
7. C. Leclercq, Droit constitutionnel et institutions politiques, Litec, 1990.

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