

## CONSIDERATIONS REGARDING THE CONTROL OF THE CONSTITUTIONALITY OF LAWS

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**Abstract:**

*This paper illustrates the theoretical aspects regarding the notion of control of the constitutionality of laws as well as the need for exercising this type of control in a state of law. Likewise, there will be emphasized some forms of constitutionality control that exist in different historical or contemporary judicial systems.*

*The second part of this article treats the singularity of the control of the constitutionality of laws in Romania, presenting the attributions of the Constitutional Court the control procedure, the documents issued by the institution authorized to control as well as the judicial effects of these documents.*

**Keywords:** *The control of the constitutionality of laws, preliminary control, the exception of unconstitutionality, judicial effects of the control of the constitutionality of laws.*

### General Considerations

The control of the constitutionality of laws, theorized by Kelsen (1918) is organized in two main systems: control through a jurisdictional organ, also named the American system and control through a single special and specialized organ or the European system. [1]

The constitutional justice has progressively conquered a central position within the system of liberal institutions; by guaranteeing constitutional balance and by protecting the rights and liberties it has a major influence on the entire political system. taking into consideration that the „governing of the judges” is fairly agitated, often the latent conflict of legitimacy that opposes it to the political power constrains the constitutional justice to a certain cautiousness, expressed through a political jurisprudence that oscillates between activism and reserve, according to the political context.

The constitution is the fundamental law that has supremacy in relation to all other sources of law. Stating the supremacy of the constitution implies the

existence of certain control mechanisms of the accordance with the laws of the constitution. It is, therefore, necessary to ensure control of the constitutionality of laws, of the subordinate judicial rules. Without the existence of a penalty for the violation of constitutional rules by one of the constituted powers, the difference of principle between the constitution and ordinary laws gives way to a factual confusion. Therefore, there must be established a form of control to lead to the annulment of the unconstitutional judicial laws.

Summarizing, it can be stated that the need to exercise constitutionality control is due to the existence of the principle of the separation of state powers, on one side, and, on the other side, the constitutionality control is founded on the principle of the supremacy of the Constitution. [2]

Motivating the need for the existence of control of the constitutionality of laws to ensure the guarantees system necessary to the manifestation of the constitution as a normative act with supreme judicial power, in the speciality literature the control of the constitutionality of laws is defined as being: "the organized activity of verifying the compliance of the law with the constitution and, as an institution of constitutional law, contains rules regarding the authorities that are authorized to make this verification, the followed procedure and the measures that can be taken after following the procedure". [3]

The control of the constitutionality of law solely regards the law as a judicial act of the parliament as well as normative acts with judicial power equal to the power of the law (named law-decrees, decrees with the power of a law or ordinances), due to the fact that the other normative acts issued by the executive organs answer the request of legality (are in compliance with laws) and the control of their legality is made through usual means including through administrative jurisdiction.

By control of the constitutionality of laws, it is understood the ensemble of the normative dispositions that regulate the verification activity of the compliance of laws and other normative acts with the dispositions of the Fundamental Law. [4] The premises of these judicial norms can naturally be found in the

constitution. To them, there are added the norms within the special normative act which regulate the organization and functioning of the institution invested with prerogatives of constitutional jurisdiction. [5]

## **1 The Forms of The Control of The Constitutionality of Laws**

### **1.1 Control through public opinion**

It is the elementary control that contains the reaction of the public opinion when a constitutional provision is violated. This form of control has its ideological foundation in the theory of resisting oppression and its judicial foundation in the constitutions that have established the right to insurrection. This form of control is considered primitive because it implies violence.

### **1.2 Political control**

Is the control exercised by the legislative organs and by state organs that are different from the legislative ones.

For some authors, the control exercised by the parliament is an authentic one and, at the same time, a form of self-control because the parliament is the one who votes the constitution and, therefore, is the most qualified to appreciate the compliance between the law and the constitution that it has adopted.

As a contrary opinion, it is said that this constitutionality control must be made by another organ than the one that makes the law due to the fact that this control means that the parliament is its own judge, a concept that contradicts the idea of constitutional justice. [6]

### **1.3 The jurisdictional control**

It is exercised either by the judicial organs or by other organs that use a similar procedure to the judicial one.

The jurisdictional control can be made, as appropriate, either as an exception or as an action meaning that the law will be examined in a trial when one of the parts lifts the exception of unconstitutionality (for example USA) or that the control will have as object a law that is considered unconstitutional (for example Germany, Italy). The effects of this type of control can be either erga

omnes (like in the USA) or only between the litigator parts (in Romania, according to the 1923 Constitution).

#### **1.4 Other forms of control**

##### *1.4.1 The implicit and explicit control*

We find ourselves in the presence of the explicit control when the fundamental law (the constitution) expressly provides it and thusly consecrates the obligation of this constitutionality control and, eventually, the authorized organ and the followed procedure (for example in France, Switzerland, Austria, Romania).

There is an implicit control if the constitution does not expressly consecrate it but it is exercised as a consequence of the existence of the legality principle. [7]

##### *1.4.2 The previous and subsequent control of the adoption of laws*

The previous control of the adoption of laws (also named preventive control) is exercised in the bill stage of the law.

The subsequent control of the adoption of laws is exercised on the already adopted laws or on the normative acts with a judicial power equal to the law. This is a genuine control that is usually provided within the explicit control, the authorized organ and the followed procedure.

##### *1.4.3 The abstract and concrete control*

The abstract control regards the verification of the constitutionality of a law outside any litigation in the face of the court of law, in other words, the issue of the compliance of the law with the constitution is not seen as a „prejudicial matter“. [8] It is an action control and can be exercised either a posteriori when it is made on a norm that has already come into force or a priori when it regards a norm that has not yet come into force.

The concrete control evokes the idea that the unconstitutionality exception has been brought to attention within a trial when the judge would apply the litigious law. In other words, the constitutional justice is called to solve the „prejudicial matter“ of the unconstitutionality exception. The unconstitutionality

exception can be brought to attention either by one of the parts or ex Official by the court. This control is an a posteriori one, therefore, it is exercised on a norm that has been adopted and that has come into force. [9]

## **2 The Control of The Constitutionality of Laws in Romania**

The control of the constitutionality of laws is regulated by the Constitution of Romania as well as by the Law no. 47/1992 regarding the organization and functioning of the Constitutional Court (with the changes brought by Law no. 138/1997) republished. In the development of the constitutional and legal dispositions, the Constitutional Court has adopted the Regulation for organization and functioning.

### **2.1 *Attributions of the Constitutional Court regarding the control of the constitutionality of laws***

- a) Exercises a control of the constitutionality of law that is previous to their enactment, after being notified by the President of Romania, by one of the presidents of the two Rooms, by the Government, by the Hight Court of Cassation and Justice, by the ombudsman or by a number of at least 50 deputies or at least 25 senators.
- b) Pronounces on the constitutionality of the revision initiatives of the Constitution; in the exercise of this attribution, the Constitutional Court is notified ex officio and has the task to pronounce on whether the revision of the Constitution is to be made in accordance with art. 150 (the revision initiative) and art. 152 (regarding the limits of the revision) of the Constitution.
- c) Pronounces on the constitutionality of treaties or other international agreements at the notice of one of the presidents of the two rooms, of a number of at least 50 deputies or at least 25 senators.
- d) Pronounces on the constitutionality of the Parliament's regulations at the notice of one of the presidents of the two chambers, of a group of parliamentarians or a number of at least 50 deputies or at least 25 senators.

- e) Decides the unconstitutionality exceptions regarding the laws and ordinances brought to attention before the courts of law or by commercial arbitration, the unconstitutionality exception can also be brought into attention by the ombudsman.

## **2.2 The procedure of the Control of the Constitutionality of laws**

### *2.2.1 The procedure in case of the constitutionality control of laws before promulgation (preliminary constitutionality control)*

In this case, the Constitutional Court can act only if notified. It cannot notice itself *ex officio*. In what concerns the law subjects that can notice the Constitutional Court, they are the President of Romania, the presidents of the two Chambers of the Parliament, the Government, the Supreme Court of Justice, a number of at least 50 deputies or at least 25 senators. No other notice on behalf of any other law subjects can be taken into account. [10] The notice addressed to the Constitutional Court must be written and motivated.

Within the law regarding the organization and functioning of the Constitutional Court, procedural details are provided so that the ones entitled to notice to acknowledge the content of the law. Thus, 5 days before the law is promulgated, the law is communicated to the Government and the Supreme Court of Justice and it is filed by the general secretaries of the two Chambers. For adopted laws, an emergency procedure, the term is only 2 days. The operation of filing the law to the general secretaries is brought to attention in the plenary of every Chamber within 24 hours from its filing. The law firmly provides that the filling and communication is only made on days when the Chambers of Parliament work in plenary.

In what concerns the notice made by the parliamentarians, it is sent to the Court on the day the general secretary of the certain Chamber receives it. [11]

The Constitutional Court, in order to solve the issue, has the obligation to communicate the received notice, as appropriate, to the President of Romania, on the day of filing, if the notice comes from the President of Romania, the parliamentarians or from the Supreme Court of Justice, also stating the date of

the debates. Until the date of the debates and in the sight of them the presidents of the two Chambers and the Government may express their point of view in writing. As such, according to law, these authorities are not compelled to express their point of view, the judgment of the notice being able to unfold without them. [12]

Solving the notice is made by debate or in the plenary of the Constitutional Court. According to law, the debate is carried through both over the provisions mentioned in the notice and the ones that, necessary and obviously, cannot be dissociated.

As such, the judges debate and decide over the provisions mentioned in the notice or the ones that, necessary and obviously, cannot be dissociated. It would be possible that the provisions from the second category to include the whole content of the law (thus being made a thorough control of the law) but in this certain situation this control is motivated by law.

The issue is extremely interesting from a judicial point of view and the solutions will come out of the context of the issue. It is however without a doubt that the extension of the control of provisions that are not necessarily and obviously associated with the notified ones has not been the intention of the legislator. Another interpretation would limit, even bother, the control on means of the unconstitutionality exception. [13]

After deliberating, the Constitutional Court decides with the vote of the majority of the judges and the decision is communicated to the President of Romania in order for the procedure of law development to be complete.

If the unconstitutionality of the legal provisions has been decided, the decision is also communicated to the presidents of the Chambers of Parliament in order to commence the procedure provided by art. 147 (1) of the Constitution. The decisions of the Constitutional Court are published in the Official Monitor of Romania and are compulsory and only have power for the future.

The singularity of the preventive control is that it interferes with the legislative process. [14]

Uniting the previous abstract control with the subsequent one would try to ensure plentitude to the vocation and obligation of the Constitutional Court to guarantee the supremacy of the Constitution as one of the sine qua non conditions of the state of law and of constitutional democracy.

Exercising a subsequent control, by the unconstitutionality exception, cannot replace the absence of an a posteriori abstract control due to the fact that the exception unavoidably implies the existence of a trial.

Both the abstract and the apriori control are in essence optional by conditioning its exercise with the existence of a notice but it is compulsory after the notice of the Constitutional Court. Therefore, in a first stage, the vocation of the Constitutional Court is aleatory and then, in a second stage, the constitutionality control is compulsory, the Court not being able to refuse the fulfillment of an attribution that is part of its constitutional competence. [15]

The control made according to art. 146 paragraph (1) letter a) of the Constitution targets the laws only before their promulgation, resulting in that:

- they can make the object of this control the laws adopted in the Chambers of Parliament
- through laws as an object of the control of constitutionality there are understood both the organic and the ordinary laws.

Although in the generic term of „law” there are surely also included the laws of revising the Constitution, these have a special judicial regime, the control over the initiatives of revising the constitution being exercised ex officio, taking into account that the constitutionality control targets the law, all laws are susceptible to control. According to the disposition of the legal provisions the laws adopted by referendum cannot be the object of the constitutionality control due to the fact that the direct exercise of the national sovereignty by a people through referendum is by definition uncontrollable and to the fact that a referendum is not subjected to promulgation and the constitutionality control is exercised before promulgation.

The constitutionality control is control of the compliance with the law with the Constitution, not an opportunity one. The constitutionality principle is a judicial process implying, among others, hierarchical ordering of the judicial norms, including the ones with law character. The principle of opportunity is essentially political and it imposes a time and manner option within concrete circumstances and based on the hierarchy of certain values or strange, an option that has been objectified by a supreme political authority – the judicial authority. The decisions of the Constitutional Court are pronounced in the name of the law, a fact that excludes ab initio the statement of such acts in the name of opportunity.

Through its decision, the Court does not repeal the law or the disposition of a law that is incriminated under unconstitutionality reason, it only observes the unconstitutionality. The Court does not have the power to repeal the law.

#### *2.2.2 The procedure in case of solving the unconstitutionality exception (the subsequent control)*

The unconstitutionality exception is an efficient method of defending the public rights and liberties, it is a defensive procedure that implies waiting for the law to apply to you in order to attack it. [16] It regards an issue found in the role of a certain court of law procedure that implies that the interested person can attack the law based on which the court has made its decision, believing the law to be unconstitutional.

Through itself, the unconstitutionality exception regards a triggered judicial trial in which, by attacking the action of concretely applying the law, the interested one demands the ascertainment that the legal disposition based on which the unconstitutional appliance is based and as such must be removed. Naturally, the procedure of invoking and solving the unconstitutionality exception is regulated in detail by law, it being at the disposition of the legislators.

This method of control has a significant seniority, the courts being the first organs that faced, in judicial practice, with the unconstitutionality of a law. The

exercise of this control by the courts of law is an expression of the application of the principle of the separation of the powers.

The theoretical base of the control of the constitutionality of laws according to the principle of the separation of powers is unanimously accepted in the constitutional doctrine. Some authors have even emphasized that giving this type of control to the courts is a logical consequence of the separation of powers and therefore it should no longer be expressly provided. [17]

The unconstitutionality exception can only be brought to the attention of the courts of law by one of the parts or by the ex officio court. The unconstitutionality of a legal provision can only be summoned if the judging of a case depends on it, therefore, only if it is directly related to the certain case.

Only in these situations, the Constitutional Court can be notified and only by the court that has been brought to the attention the unconstitutionality exception. The court will decide this through a conclusion that will include the points of view of the parts that support or oppose the exception and the court's opinion on the exception. The conclusion will be accompanied by the proof of the parts. If the exception has been brought to attention ex officio by the court of law the conclusion must be justified, also including the statements of the parts as well as the necessary proof. Triggering the procedure of the unconstitutionality exception can determine the suspension of the trial but this is the decision of the court and is made by a justified conclusion.

An appeal can be made against the suspension conclusion within 5 days from the decision.

Receiving the notice, the president of the Constitutional Court designates the panel of judges, made of 3 judges, one of whom is designated by the president. The president of the panel of judges designates one of the judges to be the speaker. If the judge designated as speaker thinks that the exception is obviously ungrounded or violates the legal provisions regarding the notification of the Court he will notify the president in order to summon the panel of judges that can decide, with the unanimity of votes, to reject the exception without citing the

parts. In the other cases, the speaker judge is bound to communicate the conclusion through which the Constitutional Court has been notified to each Chamber of Parliament and to the Government, indicating the date until when they can file their point of view. The speaker judge will also take the necessary measures to manage the proof from the date of judgment.

The panel of judges will base its judgment on the report presented by the speaker judge, the conclusion for notifying the Constitutional Court, the presented points of view, the managed proof, the support of the parts, with their citation and the citation of the Public Ministry. The parts can be assisted by lawyers with the right to plead to the Supreme Court of Justice.

An appeal can be made against the decision within 10 days from its communication. The appeal is judged by a panel of 5 judges, one of whom is the president of the Constitutional Court or his substitution who will preside over it. If the appeal is approved, the appeal court also decides, through the same decision, on the unconstitutionality exception.

The panels of judges decide by the majority of votes. The final decisions that observe the unconstitutionality of certain legal provisions are communicated to the two Chambers of Parliament and to the Government. All final decisions are published in the Official Monitor of Romania.

### ***2.3 The Actions of the Constitutional Court Regarding the Control of the Constitutionality of Laws and Their Judicial Consequences***

The Constitutional Court, according to the law regarding its organization and functioning, in the control of the constitutionality of laws files can make decisions in the following cases:

- decides the constitutionality of laws before they are promulgated;
- decides the constitutionality of the Parliament's regulations;
- decides the exceptions brought to the attention of the courts of justice regarding the unconstitutionality of laws and ordinances.

### 2.3.1 *Judicial consequences of the actions of the Constitutional Court*

They have consequences directly related to the attribution exercise by the court. Thusly:

- The dispositions from the laws and ordinances in force, as well as other regulations, found to be unconstitutional, terminate their judicial consequences within 45 days from publishing the decision of the Constitutional Court. During this term the dispositions found to be unconstitutional are suspended by law;
- in cases of unconstitutionality that regard laws before their promulgation, the Parliament is bound to reexamine the certain dispositions in order to change them according to the decision of the Constitutional Court;
- in the case of revising the Constitution, the decision of the Court has the judicial power of a notice in the revision issue;
- in regards to the unconstitutionality exception, the decision of the Constitutional Court has judicial consequences on it, meaning it cannot be applied (the decision of the Court does not take the legal provision out of the legislation, it remains in force although it will no longer be applied in the future). It is the same in the case of the Court's decision regarding the unconstitutionality of the Government's ordinances.

Coming back to the decisions of the Constitutional Court, these have compulsory character. Some of them are final, others can be appealed. The final decisions are adopted by the Court in what concerns the initiatives of revising the Constitution, solving the unconstitutionality exceptions brought to the attention of the courts of law, respecting the procedure of electing the President of Romania, referendum, litigations that have as object the constitutionality of a political party and the public legislative initiative.

In what concerns the decisions expressed in virtue of the preliminary constitutionality control, if they refer to the unconstitutionality of law, the unconstitutionality objection of the Cort can be removed if the two Chambers adopt the Law again with a majority of at least two-thirds of the number of its members.

In the case of deciding over the constitutionality of the Parliament's regulations, if the final decision of the Court establishes the unconstitutionality of the legal provisions it no longer applies in the certain case. In other words, the decision of the Constitutional Court paralyzes the judicial effects of the contested judicial norm in the trial that summoned the unconstitutionality exception. [18]

The object of the unconstitutionality exception cannot be made by the legal provisions whose constitutionality has been established by the Court through preliminary control.

The final decision that states the unconstitutionality of a law or of an ordinance or of a disposition from a law or ordinance in force is final and compulsory.

The decision that states the unconstitutionality of a law or of an ordinance is a legal base for retrial, at the request of the part that invoked the unconstitutionality exception in a civil trial.

In criminal trials, the decision of unconstitutionality is a legal base for the retrial of the cases when the conviction was based on the legal provisions declared to be unconstitutional. [19]

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