THE RULE OF LAW AND THE GENERAL CONTROL OF THE APPLICATION OF THE CONSTITUTION IN CONTEMPORARY CONDITIONS

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Abstract:
The control of the constitutionality of laws is one of the legal guarantees of the supremacy of the Constitution. This control is included in the principle of equality, because normative acts must be developed according to a predetermined procedure and the Constitution, on the one hand, and on the other hand, the law, including the Constitution, must be respected by all state bodies. Control is understood as an activity of verifying the application of the principle of conformity of the law with the Constitution and as an institution of constitutional law, which includes rules brought together due to the same regulatory object. Only the law, as a legal act of the Parliament, as well as normative acts with legal force equal to that of the law (ordinances, decree-laws) are subject to control. Administrative documents are not subject to this control because they are issued in the execution of the law.
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In contemporary conditions, the concept of the rule of law as the only alternative for the development of states in accordance with the authentic social values of contemporary societies has been particularly updated. In this context, the rule of law can be understood as a political-legal concept that defines a form of democratic government regime from the perspective of the relations between the state and law, between power and law, by ensuring the rule of law and fundamental human rights and freedoms in the exercise of power.[1]

The theory of the rule of law first postulates the administration's submission to the law: the executive must obey the rules that constitute the foundation, framework and limits of his action; obedience, guaranteed by the existence of a control exercised either by the ordinary judge or by special courts.[2]

The rule of law as a historical reality and concept presents indisputable requirements and certain advantages as a contemporary value, being at the same time perfectible, in relation to historical experience and trends of social progress.[3] Thus, in the Constitution of Romania, in article 1 paragraph (3) it is provided that: *"Romania is a state of law, democratic and social, in which human dignity, the rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values and are guaranteed."*

The general control of the application of the Constitution is the essential condition of the rule of law, because in its absence the Constitution has only a symbolic importance. The control of the constitutionality of laws is an organized activity of checking the conformity of the law with the Constitution.[4]

The idea of the constitutionality control of the laws appeared against the background of the development of the constitutionalist movement, from the need to ensure the guarantees that make the mandatory superior force of the Constitution respected in relation to the public powers and the acts issued by them.[5]

The principles of law are the expression of the values promoted and defended by law. Thus, values are of interest to the legal order both in the process of creating law, since the legislator constructs the legal norms in this axiological space, as well as in the process of realizing the law, the values thus promoted being defended by effective legal means.[6]

The general control of the application of the Constitution is the essential condition of the rule of law because in its absence the Constitution has only a symbolic importance. In contemporary constitutionalism there are two guarantees by which the balance between powers is obtained and preserved.

Thus, the control of the constitutionality of laws is organized in two large systems:

a) control by a judicial body, also called the American system and is used in the American states.

b) control through a special and specialized body called the European system.

The first model, the American one, in which control is exercised by ordinary courts appeared in 1803, starting with the famous "Marbury C. Madison" decision, when the US Supreme Court of Justice affirmed that the supremacy of the Constitution is imposed on

all, including courts that must refuse to apply a law that it considers unconstitutional, subject to the final interpretation by the Federal Supreme Court, guarantor of the uniformity of decisions.[7] The reasoning on which the decision of the American court was based was the following: either the Constitution is a superior and sovereign law impossible to change by ordinary means and, consequently, a contrary legislative act is not a law, or it is a law like any other, at discretion of the legislator and then it is absurd to attribute to him the power to limit a power unlimited by its nature.

This model is realized through two systems:

- the diffuse system (USA, Japan, Argentina, etc.), when the control can be carried out by any court in the respective country.

- the concentrated system, when control belongs to a supreme court (Switzerland, Australia, Romania during the interwar period, etc.)

The procedure and the institution of the control of the constitutionality of laws was not born on the basis of the will of any parliament (therefore positivist legal thinking), but it was born on the basis of a system of thought that is part of natural law.

Those who designed written constitutions designed them to represent the fundamental and supreme law of the nation and therefore the principle of any government in a state of law must be, that a law of Parliament contrary to the Constitution is void.

The European model entrusts the responsibility of checking the constitutionality of laws to a special and specialized body - the Constitutional Court, an institution first introduced in Austria in 1920 at the initiative of H. Kelsen, a system introduced after the Second World War in most Western European countries, and after 1989 and in the countries of Eastern Europe, including in the Constitution of Romania from 1991 and of the Republic of Moldova adopted in 1994.

The two systems (American and European) pursue the same goal, and the tendency between them is to approach, the particularities of the constitutional courts tend to progressively diminish due to the growing movement of jurisdictionalization, translated by the development of the contradictory nature of the procedure, as well as the search for ways of referral by citizens and a better articulation with judicial and administrative tribunals.

In our opinion, the control of the constitutionality of laws is the organized activity of verifying the conformity of laws with the constitution, and as an institution of constitutional law, it must include the rules regarding the competent authorities to make this verification, the procedure that must be followed and the measures that can be taken after this is accomplished procedures.

We agree with the opinion of prof. I. Muraru who specifies that in principle the control of the constitutionality of laws concerns only the law as a legal act of the Parliament or normative acts with legal force equal to that of the law.[8]

Only the acts of the parliament raise this problem, because the public administration bodies, being executive bodies, issue normative acts only in the execution of laws.[9] Administrative acts cannot contain primary regulations, and the control of their legality is carried out through usual means of control, including through administrative litigation.

Regarding the documents of the judicial bodies and the prosecutor's office, the problem does not arise here because, in principle, they apply the law and do not issue legal norms.

We believe that in principle the control of constitutionality concerns only the law or other normative acts with legal force equal to that of the law, because some constitutions provide that other normative acts with less legal force than the law can be subject to this control.

We quote in this sense art. 53 of the 1965 Romanian constitution, according to which the decisions of the Council of Ministers were also subject to constitutionality control.

The fact that in some constitutional systems the law and the constitution are adopted by the same state body (Parliament), the appearance of inconsistencies between the constitution and the law seems at first sight impossible. Considering the requirements of the government in a state of law, the removal of some fundamental provisions by laws is contrary to such a government. However, the constitutional practice of the states has recognized the possibility of the existence of these inconsistencies, and we consider the existence of the institution of the control of the constitutionality of laws to be indisputable proof. In federal states, the control of the constitutionality of laws is justified by the need

to harmonize the general interests of the federation with the specific, concrete interests of the member states.

Therefore, the control of the constitutionality of laws is the result of some state and legal realities, it is the guarantee of some constitutional structures and principles of the rule of law. The functions of this control are of particular importance because they aim to guarantee the separation/balance of state powers, as well as the protection of human rights.[10]

The control of the constitutionality of the laws presents a guarantee for the effective expression of the parliamentary opposition. If the adoption or amendment of a constitution can be achieved with the vote of two thirds of the parliamentarians and are therefore difficult to achieve without opposition, the adoption and amendment of a law require a smaller quorum. Here, in this latter situation, the opposition can also express itself through the right it has to ask some constitutional authorities to pronounce.

Constitutional practice shows that the appeal of the opposition has often found a favorable solution.

The usefulness of the control of the constitutionality of laws explains its expansion in the world, especially in the last half century, today we are talking, as L. Favoreu shows, of two great systems, namely the American and the European. [11] However, there are also constitutions that do not provide for such control (the Constitution of England).

We express our opinion that the exercise of constitutional control is necessary due to the existence, on the one hand, of the principle of separation (balance) of powers in the state and, on the other hand, constitutional control is based on the principle of the supremacy of the constitution.

As the French author J. Barthelemey shows, the principle of the supremacy of the constitution is characterized as a "generator of legality and legal stability in the democratic constitutional organization".[12]

In Romania, the 1991 Constitution introduced a mixed system, in which the control of constitutionality prior to the promulgation of laws and the subsequent control carried out by way of exception are combined in the hands of the same body, the Constitutional Court. This control is regulated by art. 142 – 146 of the Romanian Constitution and Law 147/1992 with the amendments brought by Law 138/1997 (published in M.O. no. 170 of

July 25, 1997). The Constitutional Court carries out its activity in plenary, and its acts are adopted by the vote of the majority of judges, unless the law provides otherwise.

Regarding the appointment of Constitutional Court judges, the operation involves several criticisms because their appointment is made at the discretion of some par excellence political bodies:

- Chambers of Parliament;

- The President of the Republic.

In the opinion of prof. Tudor Drăganu this operation is destined to take place under the sign of politicism.[13] The subordination of the Constitutional Court to influences foreign to its purpose is a real danger, all the more so since its members, once appointed, cannot cumulate this mandate with another public or private position, with the exception of teaching positions in higher education, so that when the mandate expires, if they are not cumulards and if the appointment was not made on the condition of reserving the previous post, they will depend for their appointment to another position on the goodwill of the Government whose interests they will be forced to cultivate.[14]

Under these conditions, the provisions of art. 145 of the Romanian Constitution, which provide that "Constitutional Court judges are independent in the exercise of their mandate and irremovable for the duration of it, are rather cosmetic because, as specified by prof. T. Draganu, once their recruitment is politically motivated, it risks having the following consequences:

- at the time of its appointment, the Constitutional Court will be formed by members close by their political sympathies and by their visible or invisible interests to the parliamentary majority and the government emanating from it. Therefore, as long as this majority remains in power, it is unlikely that the newly created court will declare unconstitutional a law that the governing party considers essential for the achievement of political goals.

- when the opposition would come to power, it would risk seeing its laws passed by Parliament declared unconstitutional under various pretexts by judges inclined to support a party that has lost the trust of the electorate.

- in such a situation the Constitutional Court would act as the third chamber of the parliament which, through its members appointed for 6 or 9 years, would ensure a political

party overthrown from power the possibility of continuing to exercise a decisive influence in the management of the state.

- considering the fact that a third of the members of the Constitutional Court are appointed by the President of the Republic, their objectivity will be questionable even when they are called upon to give their opinion on the proposal to suspend him from office (art. 146, letter h of the Romanian Constitution).

In order to eliminate these consequences, we propose a ferenda law for the members of the Constitutional Court to be elected by vote from the body of magistrates and specialists with high professional competence in legal activity or in higher legal education, thus, they being independent from power and from political forces, to be able to exercise constitutional control in the name of the sovereign people.

Another shortcoming of the 1991 Constitution is that it is not the Constitutional Court that has the last word, but the Parliament as a non-specialized political body, which amounts to a partial renewal of the system established by the 1965 Constitution, according to which the Grand National Assembly exercises general control over the application of the Constitution. Our opinion is that in a real democracy, the last word on the unconstitutionality of a law must be given to the Constitutional Court as a specialized body. The exception of unconstitutionality is an effective procedure for the defense of public rights and freedoms. It can be raised before the court by one of the parties or ex officio by the court. The Constitutional Court will decide on such an exception (from a law or ordinance), only if the resolution of the case depends on it.

In the Republic of Moldova, the activity of the Constitutional Court began only after 16.06.1995 when the parliament adopted the Code of Constitutional Jurisdiction.[15] According to the constitutional provisions, the task of the Constitutional Court is to guarantee the supremacy of the constitution, to ensure the principles of separation of power in the state, in legislative power, executive power and judicial power, and to guarantee the responsibility of the state towards the citizen and the citizen towards the state.

Unlike the Constitutional Court of Romania, which consists of 9 judges, the Constitutional Court of the Republic of Moldova is composed of 6 judges appointed for a 6-year term.

In order to preserve the balance of power in the state, two judges are appointed by the Parliament, two by the President of the Republic and two by the Superior Council of the Magistrate. In order to be appointed judges of the Court, candidates must meet certain conditions established by law. Examining the provisions of art. 135 of the Constitution of the Republic of Moldova, we will note that the Constitutional Court is authorized both to control the constitutionality of some categories of notified normative acts and to assess the constitutionality of some actions or measures undertaken by some public authorities.

In Romania, the Constitutional Court carries out the constitutional review, as a rule, upon referral, and ex officio only on initiatives to revise the Constitution.

The control upon notification works, as the case may be, "a priori" or "posterior", and the ex officio one works only in the form of prior and preventive control.

We support the opinion of prof. I Deleanu [16], who believes that it would be appropriate to introduce, following the model of other countries (Italy, Germany), and an abstract a posteriori control, when reporting the same subjects, but also of others (especially the County Councils) in consideration of the following reasons:

- the combination of prior and posterior abstract control would ensure the fullness of the Constitutional Court's vocation and obligation to guarantee the supremacy of the Constitution, as one of the sine qua non beliefs of the rule of law and constitutional democracy.

- often only in the process of applying the law are its unconstitutionality flaws relevant;

- the existence of prior control cannot be an immunity clause of the law under the aspect of its constitutionality, it cannot be converted into an absolute presumption of constitutionality, which prevents the exercise of a subsequent control.

- the exercise of subsequent control, through the exception of unconstitutionality, cannot replace the non-existence of an abstract a posteriori control, since the two types of control are essentially different - one is abstract, and the other is concrete.

- concrete control is by definition a heterogeneous control and under certain aspects even heterogeneous. It is a processive and long-lasting control, thus maintaining a possible constitutional inconsistency and instability.

The local public authorities through the county councils would thus have at hand an instrument for guaranteeing and emphasizing their autonomy, but also for the protection of the prerogatives conferred on them by the Constitution against possible non-constitutional laws.

The abstract and "a priori" control is an optional control at the origin, by conditioning its exercise on the existence of a notification, but it is mandatory, after the notification to the Constitutional Court. Therefore, within this control system, in a first phase, the vocation of the Constitutional Court is random, and then in a second phase, the constitutional control is mandatory, the Court not being able to refuse to fulfill an attribution that is part of its constitutional competence.

We believe that it should be institutionalized in the form of prior control and ex officio control, as prof. I. Deleanu.[17]

Multiplying the possibilities of constitutionality control cannot be a cause of upheaval of the constitutional state of law, but can even be a factor of its consolidation. The fundamental effect of the constitutionality control is that of the constitutionalization of the right, i.e. the elimination of obstacles to the recognition of the supremacy of the constitution in the sense of achieving compliance with it of the entire legal system.[18]

The constitutionality of a law is a matter of public order, so it cannot be the prerogative of political authorities only.

The recognition of the right to refer to the Constitutional Court in favor of the County Councils, we consider that it would enrich and emphasize the principle of local autonomy in a state of law, a principle enshrined in art. 121 of the Romanian Constitution or art. 112 of the Constitution of the Republic of Moldova.

Since the Constitutional Control concerns the law regardless of its regulatory object, all laws are susceptible to control despite their variety in terms of the regulated matter (financial laws, laws on the ratification of international treaties, electoral laws, laws having as their object crimes and the regime of their execution etc.). Laws adopted by referendum cannot be subject to constitutional review.

The law resulting from the referendum is a law that expresses the will of an "original power" and no "derived power" can defeat it. The direct exercise of national sovereignty

by the people through a referendum based on art. 2 paragraph 1 of the Romanian Constitution is by definition uncontrollable.

The Constitutional Court ensures compliance with the procedure for organizing and conducting the referendum and confirms its results (art. 146, letter c of the Romanian Constitution).

The principle of constitutionality is an essentially legal principle, involving, among other things, the hierarchical ordering of legal norms, including those that take the form of law, as well as ensuring the material and formal conformity of these norms with those of the Constitution; the principle of opportunity is essentially political, it implies an option of time and method, in concrete circumstances and based on the ranking of certain values or strictness, an option objectified by a supreme political authority - the legislative authority. The Constitutions of a number of nations contain expansive provisions regarding human rights and freedoms and the legal status of the individual.[19]

The Romanian Constitution of 1991 enshrined the idea of the rule of law precisely as a reaction against the omnipresence of the totalitarian state in the period preceding the events of December 22, 1989. It was wanted to emphasize in particular the fact that in the future, in Romania, the entire state activity will be subordinated the right, the laws, not allowing any deviations from their principles. Under the conditions of the rule of law, the values of democracy appear for the first time as no longer being simple declarative statements, but genuine values, guaranteed by the mechanism of the defense of the law. Respect for citizens' rights and political pluralism become natural consequences of the resettlement of the entire Romanian political life based on the principles of law.[20]

As Professor Antonie Iorgovan pointed out, *"The modern doctrine of the state is based on the healthy theses of the social contract, of natural rights, of the separation of powers. To define the state, at present, without referring to freedom and human dignity means nonsense"*[21].

The desired rule of law and democracy constituted the premises of the constitutionality control around the adoption of the Romanian Constitution of 1991. That is precisely why, in our country, the European model of control of the constitutionality of laws was chosen. Thus, the Constitutional Court has prerogatives to control the constitutionality of laws before their promulgation and a posteriori control powers over the

laws and ordinances of the Government, which are in force and on which the resolution of cases before the courts depends. Considering the constitutional tradition of our country, the Constitutional Court has been transformed into a "watchman" that forces state institutions not to exceed their constitutional prerogatives. Proclaiming, promoting, defending and guaranteeing the inalienable fundamental rights of man is another basis of constitutionalism as such and of Romanian constitutionalism, in particular. The enshrinement of human rights is closely related to the existence of a judicial appeal.

Conclusions

1. The rule of law in theory is an integrative concept aimed at the political-legal correlation. It represents a certain stage and an expression of the relationship between social leadership and normativity, between power and normativity.

2. The rule of law is a political-legal concept that defines a form of democratic government regime from the perspective of the relations between the state and law, between power and law by ensuring the rule of law and the fundamental rights and freedoms of man in the exercise of power.

3. The corollary of the rule of law must be the consecration, guarantee and promotion of human rights at the level of international standards, the creation of a favorable climate for the manifestation and valorization of the human person; the state and law must work effectively for man. The rule of law must act on the basis of law and respect its form as an expression of the general will.

4. From the perspective of practice, we emphasize that the functionality and optimization of the political-law relationship in building the rule of law is gradually achieved by always confronting and overcoming the contradictions of social life. The rule of law is a perfectible concept, open to science and social practice. The rule of law faces a variety of problems in the context of globalization, and the future development of the democracy of the states could be greatly strengthened by the construction of transnational forms of democracy.

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