THE FIRST ATTEMPTS OF ESTABLISHING A JUDICIAL REVIEW OF CONSTITUTIONALITY – THE CASE OF GREAT BRITAIN[1]

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ABSTRACT: *Early manifestations of judicial review of constitutionality should be sought in the British constitutional system, although it is true that it needed the intervention of the Supreme Court of the Union States of America (1803) to build a system of judicial review in what concerns the constitutionality of laws (judicial review – named in the Anglo-Saxon system). Thus, when the forms of political control were not enough anymore, the jurisdictional review turned up. It is exercised by courts (either by all of them or only by the Supreme Court) and the arguments in favor of the organization of such a review are varied and more than convincing.*

KEYWORDS: *constitutional review, political control, jurisdictional review, judicial review*
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What is specific to the British Constitution, and distinguishes this type of constitution from a rigid one, is the fact that the fundamental law can be amended by the ordinary procedure, like any ordinary act, therefore by a mere normative act of the Parliament[2]. Thus, the Constitution of Great Britain cannot be framed neither in class of customary constitutions[3] nor in the class of the written constitutions[4], therefore it cannot be

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[2] Great Britain is considered the origin country of the Parliament, „*mater parliamentorum*" – see Joseph Barthélemy, Paul Duez, *Traité de droit constitutionnel*, Edition Panthéon-Assas, Paris, 2004, republished edition of 1933, p. 45; Georges Vedel, *Manuel élémentaire de droit constitutionnel*, republication presented by Guy Carcassonne and Olivier Duhamel, Dalloz Publishing House, Paris, 2002, p. 32.

[3] The customary constitutions are the constitutions formed of customs, and they (also called legal customs) are "the *rules of social conduct which, although they are not issued by the competent state bodies to legislate, they are still considered mandatory whereas being the expression of the human collective belief that they respond to human sense of justice, they are enshrined as being mandatory through a long and constant practice*" – see Tudor Drăganu, *Drept constituţional şi instituţii politice – tratat elementar,* Lumina Lex Publishing House, Bucharest, 2000, vol. I, p. 42.

considered a formal[5] constitution as it has a *mixed character*. Again, normative acts passed by the Parliament are the only form of legislation which can not be limited in their application by any of the other state authorities[6]. This fact allows us to assert, in a simplistic approach, that there shouldn't be raised the issue of the constitutional review when it comes to systems based on customary constitutions. If an ordinary law of the Parliament contained provisions opposed to constitution there wouldn't be a breach of the constitution but only an amendment of it[7], "*as the Parliament is always a Constituent Assembly representing the limitless power of the Nation itself*"[8].

The British doctrine ordinarily states that "*the Parliament is free to do whatever it wants because it is the supreme body and it is not bound by any legal rules; this rule is one of the fundamental principles of the British constitutional law*"[9]. Even in the French doctrine Great Britain was considered "*the country with a great parliamentary tradition*"[10].

But the British law system, like any democratic legal system, is based on another fundamental principle – *the principle of legality*. Although the "supremacy" of the British Parliament is a won issue in the battle between the absolute power of the monarch and the representative assemblies (enshrined by the most important written acts considered even today as being part of the British Constitution[11]), the *supremacy of the principle of legality* turned out to be more important.

Today, the British Constitution is formed by "a flexible assembly of written laws ("*statute law*"), court decisions pronounced by courts over time ("*case law*" or "*judicial precedent*"), agreements ("*conventions*"), customs and practices"[12].

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[4] The written constitutions are those constitutions formed exclusively of written rules, incorporated either in a unitary and systematized text or in a set of legislative acts – see Tudor Drăganu, *op.cit.*, vol. I, p. 44. About the control of constitutionality in Romania, a state with a rigid Constitution and the "competition" between the ordinary judge and the constitutional judge – see Lucian Chiriac, *The contest among the Decision of Romanian Constitutional Court and the Decisions of the Romanian High Court of Cassation and Justice in the recourse in the interest of law*, in the Review „Juridical Current", no. 2/2011, pp. 11-18.

[5] The formal constitution is characterized not only by a writing form, which may be unitary (the rules are systematized in a single text) or divided (the rules are found in many constitutional laws) but also through a special procedure of elaboration, adoption and amendment– see Mircea Criste, *Teoria şi practica Dreptului Constituţional*, WorldTeach Publishing House, Oţelu-Roşu, 2007, pp. 20-21.

[6] See *Actele constituţionale ale Regatului Unit al Marii Britanii şi Irlandei de Nord*, translation and notes – Elena Simina Tănăsescu, All Beck Publishing House, Bucharest, 2003, p. 5.

[7] See Tudor Drăganu, *Introducere în teoria şi practica statului de drept*, Dacia Publishing House, Cluj-Napoca, 1992, p. 97.

[8] See Emil Miclescu, *Sistemul constituţional anglo-saxon*, in *Noua Constituţie a României. 23 de prelegeri publice organizate de Institutul Public Român*, Cultura Naţională Printing Shop, Bucharest, 1922, p. 282.

[9] See D.C. M. Yardley, *Introduction to British Constitutional Law*, Seventh Edition, Butterworth & Co Publishers Ltd., London, 1990, p. 33.

[9] See Joseph Barthélemy, Paul Duez, *op.cit.*, p. 45.

[10] See Joseph Barthélemy, Paul Duez, *op.cit.*, p. 45.

[11] „Magna Charta Libertatum" (1215), „Petition of Rights" (1627), „Habeas Corpus" (1679), Bill of Rights (1689), „Act of Setlement" (1701).

[11] See John Morison, Gordon Anthony, Brian Cain O'Neill, *Le regime politique du Royaume-Uni*, in *Le regimes politiques des pays de l'UE et de la Roumanie*, coordinator Genoveva Vrabie, R.A. „The Official Journal of Romania", Bucharest, 2002, p. 339 (our transl.).

[12] See John Morison, Gordon Anthony, Brian Cain O'Neill, *Le regime politique du Royaume-Uni*, in *Le regimes politiques des pays de l'UE et de la Roumanie*, coordinator Genoveva Vrabie, R.A. „The Official Journal of Romania", Bucharest, 2002, p. 339 (our transl.).

The *common law*[13] occupies a particular place in the structure of the Constitution due to its role and its particularity. It represents an assembly formed of customs, practices, and court decisions collected over time and which concretized in a series of fundamental principles, proved to be indispensable by the daily experience, thus being respected[14] and "*they penetrated so deeply in the public spirit that they dictate* – and dictate even today – *like everlasting axioms of social existence*"[15]. Thus, the binding and the common law features are based on the fact that they are rooted in the will of the society; it is, as characterized, "*a popular law generated spontaneously by the society*"[16].

But what happens when the constitutional rules are violated even by the Parliament? A simple answer would indicate that the *judge*, as a defender of justice and law, is competent and responsible to determine and sanction the violations committed by the Parliament. The judge's role regarding the law achieved consistency when the judge's independence became a constitutional principle. The British courts, in the settlement of a case may remove from application a law issued by the Parliament which they consider unconstitutional without formally declaring it so[17].

The idea that an act of the Parliament which is opposed to the fundamental law should be considered *void* was expressed for the first time in 1610, within the trial of "Doctor Bonham"[18].

Doctor Bonham, who received his degree at Cambridge University, was accused of illegal medicine practice in London, respectively without having an authorization from the Royal College of Physicians). Doctor Bonham was arrested and judged by the Royal College of Physicians, based on an Act of Parliament and, being found guilty, he was punished by having to pay a fine. Half of that amount was to be deposited in the Royal Treasury and the other half to the Royal College of Physicians. Doctor Bonham, considering himself harmed by such an act, addressed to the court. The Court went in the plaintiff's favor, considering that, although it acted based on a legislative act, by its action, the Royal College of Physicians violated one *of the fundamental principles of the common law*, namely that "*no one can be judge in his own trial*" exactly what happened in this case, a reason why the Royal College of Physicians applied a pecuniary penalty constituted in its own income.

The president of the court judging this case, Edward Coke, in his position of Chief Justice[19], stated that "*when an act of the Parliament is contrary to the common law and*

[13] That part of the Anglo-Saxon judicial system consisting of ancient customs and judicial decisions pronounced over time and which have a superior value than the laws issued by the Parliament, which must comply with. – see *Cambridge Advanced Dictionary*, Cambridge University Press, 2003, p. 242 (our transl.).
[14] See Alexandru Văleanu, *Controlul constituţionalităţii legilor în dreptul român şi dreptul comparat*, „Ion C. Văcărescu" Printing shop, Bucharest, 1936, p. 5.
[15] See Tudor Drăganu, *Introducere în teoria şi practica statului de drept*, p. 99.
[16] See Claudia Gilia *Teoria statului de drept*, C.H. Beck Publishing House, Bucharest, 2007, p. 39.
[17] See Tudor Drăganu, *Tratat de drept constituţional şi instituţii politice – tratat elementar*, vol. I, p. 291.
[18] For details regarding the trial initiated against doctor Bonham, the following sources were used: Ion Deleanu, *Instituţii şi proceduri constituţionale – în dreptul comparat şi în dreptul român - tratat*, Servo-Sat Publishing House, Arad, 2003, p. 233; Claudia Gilia, *op.cit.*, p. 41.
[19] President of the Supreme Court.

reason, or it is foul or unachievable, the common law will be applied and will declare such an act to be void"[20].

It is for the first time when, based on the *supremacy of common law*, a law of Parliament is sanctioned by the British justice for noncompliance.

In Edward Coke's view, the justification of the court's role to sanction any violation of *common law* consists right in the role of the judge regarding the *common law, a decisive and creative role*. For Edward Coke, *common law*, conceived as a fundamental law of the Kingdom[21], is based on the experience and wisdom of judges, "*the law is the rule, but it is mute. ...The judges pass the law*"[22].

CONCLUSIONS

Later, but very rarely, the British jurisprudence made reference to Edward Coke's[23] point of view. Moreover, in 1647, during the government of Oliver Cromwell, the "Agreement of the People" was adopted by referendum, which even the Parliament had to obey, the supremacy of this mini-constitution deriving from the nation[24], being thus considered superior to that of the Parliament.

Despite these attempts, at that time, the opposite point of view won in the British constitutional system (a view defending the legislative supremacy of the Parliament[25] , supremacy based on the omnipotent character of the representative assembly). The idea survived to this day. Still, an analysis of the British political and constitutional system of today allows asserting that, apparently, the Parliament is the Supreme omnipotent body, in reality "*The Government is the body which, by using the parliamentary levers and the strict rules of the party discipline, succeeds in pulling the strings of the entire legislative process*"[26].

Thus, the idea of the judicial review of the constitutionality of laws "didn't put down roots on British land"[27]. In the British system, the concept of "*judicial review*" designates only the jurisdiction of the courts to determine whether the recipients' jurisdiction to enforce the law respects the settled limits[28], even if "*the British law has been and will remain a law essentially built by judges*"[29].

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[20] „*Is against common right and reason, or repugnant, or imposible to be performend, the common law will controul it, and adjudge such Act to be void*".

[21] See Dan Claudiu Dănişor, *Drept constituţional şi instituţii politice*, vol. I *Teoria generală*, C.H. Beck Publishing House, Bucharest, 2007, p. 647.

[22] See Edward Coke, *Institute of the Law of England*, vol. I, 1628, p. 130, *apud* Claudia Gilia, *op.cit.*, p. 40.

[23] Sir Edward Coke was the one who also drew up the text of the Petition of rights („*Petition of rights*" 1628) – see *Actele constituţionale ale Regatului Unit al Marii Britanii şi Irlandei de Nord*, p. 5.

[24] See Florin Bucur Vasilescu, *Constituţionalitate şi constituţionalism. Constituţia*, Naţional Publishing House, Bucharest, pp. 41-43.

[25] See John Morison, Gordon Anthony, Brian Cain O'Neill, *op.cit.*, p. 345.

[26] See Cristian Ionescu, *Regimuri politice contemporane*, All Beck Publishing House, Bucharest, 2004, p. 134.

[27] See Louis Fisher, *American Constitutional Law*, Fourth Edition, Carolina Academic Press, Durham, North Carolina, 2001, p. 37 (our transl.).

[28] See John Morison, Gordon Anthony, Brian Cain O'Neill, *op.cit.*, p. 355.

[29] See *Mario G. Losano, Marile sisteme juridice. Introducere în dreptul european şi extraeuropean*, All Beck Publishing House, Bucharest, 2005, p. 301.

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