SOME CONSIDERATIONS REGARDING THE LEGAL NATURE OF THE CONSTITUTIONAL COURT OF ROMANIA*

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ABSTRACT: *According to Article 147 paragraph 1 of the revised Romanian Constitution, the provisions of law and of the ordinances in force as well as the provisions of the regulations determined as unconstitutional, shall cease their legal effects within 45 days of the publication of the Constitutional Court Decision, if within this time the Parliament or the Government, where appropriate, does not agree with the articles of the Constitution.*

These provisions found to be unconstitutional are suspended during those 45 days. This case of power subjugation of the two authorities is exceeded in content only by Article 147 paragraph 2 of the Constitution which requires the Parliament, in cases of unconstitutionality of laws before their promulgation, namely in the previous control procedure, to review the related provisions and to bring them into line with the Constitutional Court Decision.

In an article published in the Review of Public Law no. 1/2004, professor Tudor Drăganu, concerned about the excessive powers conferred to the Constitutional Court through the Constitution revision, stated that "nowhere in Europe such Courts (Tribunals) receive the power to issue such instructions to the Parliament in order to force the Parliament to legislate the way they dictate"[1]. In the light of these findings, the professor wondered, whether we could say that the Parliament is the supreme representative body of the people and the sole legislative authority of the country?

Consequently, taking into account all the extraordinary powers entrusted to this Court, has this Court become, if not a superpower, at least the fourth power in state?

This constitutional exaggeration must be settled by placing on the revision course the constitutional waters within their riverbeds, the respect and balance between the separations of the legitimate powers of the state.

KEYWORDS: *Constitutional court, rule of law, Constitutionality control, Parliament, Romanian Constitution*

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[1] See Tudor Drăganu, "Efectele juridice ale deciziilor Curţii Constituţionale în lumina prevederilor Constituţiei revizuite", in the Review of Public Law no. 1/2004, p. 95.

In his book, perhaps too easily overlooked, "*Introducere în teoria şi practica statului de drept*" (Introduction to the theory and practice of the rule of law)[2], Professor Tudor Drăganu characterized the rule of law by the fact that it manages the rule of law in its activity, in relationship with the organizations and the citizens on its territory. This thesis which has become an axiom in the world of legal philosophy represents constancy both for the direct democracies (referendum, popular initiative, people's veto) and for the representative democracies (parliament, executive organs, judicial organs)[3].

But is it sufficient the assertion of the rule of law in the institutional and social relational system to find ourselves facing the rule of law? The legal construction of the state has no value if it is not involved into the equation of the abstract formulations within the concrete reality! But what is related to the armor of a state lies in the fact that the law has a double feature namely that of subjecting and linking the people in that territory. Maybe that is where the phrase so mythified "rule of law" comes from. (Rechtsstaat)[4].

If the state is organized on the principle of separation of powers, the absolutism is not limited to the supereminence of any of the powers, said Professor Tudor Drăganu, and therefore establishing the rule of law must be achieved on a "*system of breaks and balances*"[5]. Montesquieu brilliantly had guessed that "ces trois pouvoirs seront Forces d'aller concert" meaning that the solution for this kind of state could only be the collaboration and the mutual control. The simplicity of the algorithm helps us to easily resolve this issue. Therefore, in order to speak about a rule of law, having a mechanism composed of bodies of three powers and to claim they are under the law is not enough, but the reality must be the fruit of a single rule, namely the respect for the law, the content, the meaning and the intention of the one who adopted it.

In fact, Article 6 of the Declaration of the Rights of Man and of the Citizen, adopted in France on 26 August 1789, stated "law is the expression of the general will. Every citizen has a right to participate personally, or through his representative, in its foundation," which reconciles either a form of democracy either another.

The Revised Constitution of Romania recognizes in the Article 1 paragraph 4 that "the State is organized according to the principle of separation and balance of powers – legislative, executive and judicial – within the constitutional democracy." Therefore the Constitution recognizes the separation of the three powers and the need for a balance between them, which raises great doubt in what concerns the assigned role to the institution of the Constitutional Court, after the revision of the Constitution in 2003.

Declaration of the Rights of Man and Citizen of 1789 in Article 16 states "A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."

Is the separation of powers determined in our state system?

Jean Jacques Rousseau, pleading for the direct democracy, warned us saying "the English people think they are free but they are wrong, they are not free only while they choose the Parliament's members. Once they are elected, the people are slaves, they are nothing"[6]. The decision power in a state is given in good faith, because it is believed to be

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[2] See Tudor Drăganu, "Efectele juridice ale deciziilor Curţii Constituţionale în lumina prevederilor Constituţiei revizuite", in the Review of Public Law, no. 1/2004, p. 95.

[3] See Tudor Drăganu, „Introducerea în teoria şi practica statului de drept" „Dacia" Publishing House, Cluj-Napoca, 1992, p. 5.

[4] See Leon Duguit „Manuel de droit Constitutionnel", Editions Panthéon-Assas, Paris II, 2007 (1923) pp. 28-29.

[5] See Tudor Drăganu, *op.cit.*, p. 9.

[6] See Jean Jacques Rousseau „Despre contractul social", „MondoRo" Publishing House, Bucharest, 2007, p.104.

natural, for the political organs, constituted as a consequence of the sovereignty of the people, expressed through vote. The implementation of the vote's outcome offers us a reality – we are driven by political organs – Parliament, Government – born of the parliamentary majority, the President.

The eminent jurist Hans Kelsen tried to prove through the Law of Pure Doctrine the imperative deliverance of the law of any political interference, the need for separation between politics and science of law. First there was the state, it has created its own law, then it became subjected to it[7]. Thus Kelsen acknowledged Duguit, but we do not believe that the words said were sufficient for the existence of the rule of law, especially since the law began to sink into the political hypocrisy. Rousseau, in his work which made him so famous "*On the Social Contract*" concludes: "after we have settled the true principles of political law and tried to put the State on its foundation the only issue left would be to support it through its external links."[8]. In conclusion, we have no chance to witness the divorce of the political right, the interflow seeming endless.

Professor Tudor Drăganu said that "the main legal mechanisms of achieving the rule of law are: the control of the constitutionality of laws, the judicial control of the legality of the administrative acts and organizing an independent judiciary"[9].

If in the Greek polis was born the idea of the Constitution, if we actually turned Plato's proposal from "The Republic" into the generous offer of a "perfect borough" (philosophers, guardians, producers), it would be natural to say that in such an ideal society there was no need for a constitutional control. But as the utopia constituted the dream of many political projects, in time, the idea of the constitutional control emerged.

Constitutionality control is virtually nonexistent in countries with *flexible constitutions* (no written constitution, England, Israel). The Courts by interpretation may reduce a law to silence, may amend it, so that such a control as we understand it, is not exercised, which makes any amendment brought by the ordinary law to mean an amendment of the Constitution[10]. In the case of the countries with a *rigid constitution*, where we have written constitutions, even if the organic and ordinary law cannot change the fundamental act, the need of compliance in form and content with it imposed significantly[11]. The rigidity of the Constitution involves the strengthening of the legality and engages to some extent the immutability of the Constitution[12]. But here the question arises - who is entitled to perform this control – The Parliament – the representative body, as an expression of the people's sovereignty, the judiciary power or an organ purposely created (European model)?

Benjamin Franklin proposed a body of censors, "the Pennsylvania censorship" that can nullify any act contrary to the Constitution. Sieyès spoke of "jurie constitutionnaire" and then claimed the existence of the Conservative Senate (100 members who did not take part in the legislative forum) that could only be referred by the Government and the Courts in the First Empire, and by the government and citizens through petitions in the Second Empire[13].

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[7] See Hans Kelsen "Doctrina Pură a Dreptului" Humanitas Publishing House, Bucharest, 2000, p. 339.
[8] See Jean Jaques Rousseau, *op.cit.*, p.144.
[9] See Tudor Drăganu, "Drept constituțional și instituții politice – tratat elementar" vol. I, "Lumina Lex" Publishing House, 1998, p. 291.
[10] See Tudor Drăganu, *op.cit.*, p. 291.
[11] Ibidem, p. 291.
[12] See Joseph Barthélemy et Paul Duez „Traite de droit constitutionnel", Editions Panthon-Assas (Paris II) 2004 (Librairie Dalloz, 1933), p. 203.
[13] See Joseph Barthélemy et Paul Duez, *op.cit.*, p. 203-206.

The control may be: political (performed by a political body), judicial (Court or Tribunal) or mixed namely political and judicial (conducted by a judicial political body such as the Head of the State, Ponderative body of Romania, the Constitutional Council – in France).

The constitutionality of laws equips with many facets: a) the bills, b) previous sanction and promulgation of laws, c) after the entry into force.

1. The Constitutionality control of bills (it is a preventive control and may have a political feature). In its history, Romania has known such a control, the control exercised by the Ponderative body and the State Council, Article 13 of the Developing Statute of the Paris Convention). In this context we can retrospect the advisory opinions given by the parliamentary committees, the Legislative Council (Article 76 of the Constitution of 1923).

2. Constitutionality control of laws before their sanction or promulgation.

The control assumed that the law passed by the parliament will be either promulgated or sanctioned.

Sanction means that the Head of the state (president or king) agrees with the text of the bill[14]. Alongside the Parliament the Head of the State becomes co-legislator, takes a co-decision in drafting the law.

Promulgation does nothing more than confirm that the law was passed under the constitutional procedure and thus opens the way to apply them.

There are legislative systems that require both sanction and promulgation (the control is mixed)[15].

This form of control has its expression in the French Constitution of 13 December 1799 (the Conservative Senate), U.S. President veto, suspensive legislative veto of the President, Article 74 of the Italian Constitution of 1947, the President's request for the control of constitutionality in the French Constitution of 1958 (the Constitutional Council) and the Romanian Constitution of 1991 (Constitutional Court).

The Constitutional Council in France is a political jurisdictional organ, considered either political or jurisdictional[16], that performs a preventive control both on the bills and on the adopted laws but before promulgation. Article 61 of the French Constitution of 1958 established this rule, reinforced by a Decision of the Constitutional Council on 27 July 1928, namely, a law once promulgated, its compliance with the Constitution, cannot be denied before any jurisdiction[17]. It is no less true that by the Decision of 25 January 1985 the Constitutional Council diluted this principle stating that the promulgated law may be challenged during the exam of the legislation directives, which amends, supplements or affects its object.

3. The Constitutionality control of the laws after their enforcement

This control can be *extrinsic* (regards the procedural form of adoption) or *intrinsic* (regards the substance – the compliance with the contents of the Constitution).

Before World War II Romania attended an extrinsic control exercised by the courts of common law and an intrinsic control exercised by the Court of Cassation - United Sections.

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[14] See Tudor Drăganu, *op.cit.*, pag. 296.

[15] See Tudor Drăganu, *op.cit.*, p. 297.

[16] See Michel Verpeaux, Maryvonne Bonnard „Le Conseil Constitutionnel", la documentation Francaise, Paris, 2007, pp. 35-37; Dominique Rousseau „Droit du contentieux constitutionell", 7[e] edition, Montchrestien, Paris, 2006, pp. 53-54.

[17] See Simon-Louis Formery „La Constitution commentée article par article, 11[e] édition 2007-2008, Editions Hachete Supérieur, p. 115.

With a pragmatic view we note that Professor Tudor Drăganu didn't admit the consistency of the control exercised by the Parliament (the self-control was considered a sham[18]) and the control performed by referendum.

This posterior type of control may be exercised by:

a) the Courts of common law (1803 Marbury/Madison, Romania 1912-1923) the Decision produced *inter partes* effects.

b) the Supreme Judicial Court (especially on the exception way), produced *inter partes* effects. Romania was part of this kind of system after the adoption of the Constitution in 1923, U.S. - Supreme Court - 1803, Marbury/Madison.

c) the *Amparo* procedure (protection, assistance). It was introduced in Mexico by the Constitution of 12 February 1857 (regulated by the Law of 1897) and is currently capitalized in Spain after adoption (direct action for annulment before the Court of Appeal). This procedure ensures the competency of the federal state in its relations with the states that form it.

d) the control performed by a political and/or jurisdictional body which is not part of any power[19] Court, Tribunal, Council[20] etc. – any denomination – the body can be outside the judiciary power (the Constitutional Court in Romania) or within the judiciary control (the Federal Constitutional Court in Karlsruhe Germany). The Act (Decision) produces *erga omnes* effects. The Constitutional Court of France after the French constitutional revision by Law no. 2008 - 723 of 23 July 2008, may be referred, with the objection of unconstitutionality by the State Council or the Court of Cassation regarding the legal provisions affecting the rights and freedoms that the Constitution guarantees. The involvement[21] of the posterior control into the constitutional French system meant a step forward, but somehow not too big due to the restriction imposed by its object.

Much easier to understand are the first two forms of control that are founded on the principle of separation of powers, the independence of the justice (even though they have an interpretive effect).

The last form has an obvious political role as the Constitutional Court by its composition and duties they could not be fruitful[22] not even for the future.

The constitutionality control and its focus after the revision Romanian Constitution in 2003, undoubtedly dresses the political coat, under the circumstance where the sphere entrusted to judiciary lost its importance. The attribution of such powers to a body other than the Parliament, setting up exorbitant rules in Article 147 of the Romanian Constitution helps this type of control to overcome the principle of separation and balance of powers in State.

Hans Kelsen tried more than half a century ago to support that the general theory of law must resolve its key issues according to the principles of the pure legal and scientific knowledge, which definitely separates it from other sciences[23]. But as always there is a *but*

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[18] See Tudor Drăganu, *op.cit.*, p. 301.

[19] Under the influence of Hans Kelsen, the first Courts charged only with the control of constitutionality have been in Czechoslovakia (the Law of 29 February 1920) and Austria (the Constitution of 1 October 1920).

[20] The trial of enlarging the power of referral of the Constitutional Court of France by a proposal made in 1990 by the president Francois Mitterrand regarding certain law in force – posterior control – by using the unconstitutionality objection.

[21] See Daniela Valea, "Sistemul de control al constituţionalităţii din România" Universul Juridic Publishing House, Bucharest, 2010, p. 71.

[22] See Tudor Drăganu, *op.cit.*, p. 307.

[23] See Hans Kelsen, *op.cit.*, pag. 9.

in law, it is one of Polichinelle's secrets that politics cannot be separated from law. However, the political institutions can defend the purity of the law principles.

We do not see why the thesis according to which a Constitutional Court (Council, Court, etc.) should exist necessarily "to protect the parliamentary minority against the abuses of the majority"[24] with the risk of discrediting purpose expressed through elections and voting. But what do we do if the Court judges were elected and appointed by the parliamentary minority in power representing a majority in Parliament at that time? In our opinion we cannot pass under any circumstances over the mixed nature political-jurisdictional of such a construction, even if Dominique Rousseau believed that such a debate is unnecessary when facing the jurisdictional supereminence in particular having in view the *res judicata* enjoyed by the Constitutional Council decisions[25]. The more so, since this model is an originally European model based on the kelsian doctrine, we do not see why this debate should be "an elaborate hoax"[26] because it is more than obvious and undeniable that a "foreign body" has been introduced into the tripartite equation of the powers in State (Montesquieu, Locke) a transplant that can only have just two effects, namely one of rejection as a result of the opposition manifested by a qualified representative democracy through voting, or another of admission as a necessity without any other solution, with the risk of changing the tradition checked in history, or to give legitimacy to child born out of wedlock. Hence the conclusion that we can not determine which side of the debate is right, but obviously not all achievements of the French Revolution of 1789 are made to withstand the human body erosion and especially the of the human being. Yet a question arises? What is it that proves that the legal document called the Constitution of the United States dates from 1787, and the American model of constitutional control is not far from the tripartite and democratic separation of powers preserving in its essence the diffuse feature, specifically exercised by way of exception in the Courts as established by the U.S. Supreme Court decision Marbury/Madison since 1803?

The Romanian Constitution after revision offers the Constitutional Court a very special place, even exorbitant compared to all other institutions that make up the state.

Thus, within the previous control of constitutionality, the Constitutional Court through its decisions forces the Parliament to review the law before promulgation and the provisions found unconstitutional to be aligned with the Decision (Article 147 paragraph. 2). Agreeing to do so is achieved both on the considerations and the order of the Decision which enjoys the *res judicata*. The Constitutional Court, generous in setting its exorbitant power, stated that "*res judicata* accompanying the judicial acts, does not only attach to the order but also to the considerations that support it"[27]. In his turn, Professor Ion Deleanu mentioned in his book "Justiţia Constituţională" (Constitutional Justice) "that the constitutional jurisprudence and doctrine noted that the decisions of the Constitutional Court enjoy *res judicata* both by disposition and considerations[28].

The previous provisions of the Constitution from 1991 before the revision, admitting the sovereignty of the people expressed through Parliament, required the law to

[24] See Ioan Vida „Curtea Constituţională a României – justiţia politicului sau politica justiţiei, „Monitorul Oficial" Publishing House, R.A., 2011, pp. 18-19.
[25] See Dominique Rousseau, *op.cit.*, p. 53-54.
[26] See Michel Verpeaux et Maryvonne Bonnard, *op.cit.*, p.37.
[27] See the Decision of the Constitutional Court no. 414 of 14 April 2010, published in the Official Journal of Romania, Part I, no. 291 of 5 May 2010.
[28] See Ion Deleanu, "Justiţia Constituţională", Lumina Lex Publishing House, Bucharest, 1995, p. 349.

be submitted to Parliament for reconsideration and if adopted in the identical form by a majority of at least two thirds of the members of each Chamber, the objection of unconstitutionality should be rejected and promulgation thereof should be mandatory.

Similarly, the control exercised by the Constitutional Court over the rules of the Parliament Chambers operates for these chambers, according to Article 147 paragraph 1 and 4 of the Constitution. If the Chambers of Parliament do not agree to the provisions found unconstitutional with the provisions of the Constitution, within 45 days of the Decision's publication in the Official Journal, they cease their legal effects. After the publication of the Constitutional Court Decision the unconstitutional provisions of law are suspended. It may be that by suspension respectively the termination of the legal effects of those provisions found unconstitutional, the activity of the Chambers might be seriously disturbed or even paralyzed.

If the Constitutional Court determines the international treaties or agreements as unconstitutional it will be impossible for them to be ratified by the Parliament. The Law of ratification follows the rules of the previous control once, according to the constitutional text, the unconstitutionality of the treaties and agreements on the path of exception is prohibited.

In the case of the *posterior control* the provisions of laws and ordinances in force, found to be unconstitutional at the publication of the Constitutional Court Decision are suspended by law and in case where the Parliament (for laws) or the Government (for orders) do not align the unconstitutional provisions with the dispositions of the Constitution within 45 days, they cease their legal effects. The Constitutional Court's Decision, even if we try avoiding this truth, has an abrogating effect, according to Article 147 paragraph 1 of the Romanian Constitution.

The Constitutional Court, at the request of the President of Romania, of one of the presidents of the two Chambers, of the Prime Minister or the President of the Superior Council of Magistracy, solves the constitutional legal disputes among the public authorities. The provision of Article 146 letter *e* was also introduced when the Constitution was revised, offering the Constitutional Court the power of a judge oriented towards a more political solution than legal.

The revision of the Constitution in 2003 challenged the Constitutional Court with the role of a key player, which can perform very powerful once it can add more functions by its organic law of organization and functioning, powers that according to Article 146 letter *e* of the Constitution, are likely to be set in the Constitutional Pantheon together with all other powers expressly provided by the fundamental act.

If the Constitutional Court introduces itself as the guardian of the Constitution we ask ourselves as Iuvenal, *sed quis custodiet ipsos custodes*[29]?

The political nature by the specific nature of duties, the way of appointing the judges (undisputedly the political factor may secure by majority an overwhelming role in supporting its own interests) the role of influencing the legislative process (the negative legislator turned into a positive legislator) in competition with the jurisdictional nature (the sole authority of constitutional jurisdiction, based on the principles of independence and immovability, applying a specific jurisdictional procedure which when needed may appeal to the rules of the Code of Civil Procedure, the finality and enforceability feature of decisions, the admission decisions enjoying *res judicata*) make the Romanian

[29] Juvenal, satire, VI, pp. 347-348; („but who will guard the guardians")

Constitutional Court as plastically as Professor Dan Claudiu Dănişor expressed it, a "metapolitical power"[30].

The Romanian Constitution revised in 2003 provides us with a final scenario known in the field of constitutional control because "in no European country the Courts (Tribunals) are given the power to address the Parliament such injunctions destined to force it to legislate in the sense dictated by them"[31]. The contradiction is the fundamental order once the revised Constitution stipulates in Article 61 paragraph 1 that "the Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the country".

In other words, the Constitutional Court is subrogated to the jurisdiction reserved to Parliament by the Constitution, trying, at least so far, to act as both a negative legislator and a positive legislator. Its political nature is obvious, it reflects as a continuation of the selection style of the "*constitutional judges*" and leaves no hope to judiciary in expressing itself according to the principle "*audiatur et altera pars*".

In *conclusion*, Romania, with a substantive revision of the Constitution, has to choose among the constitutionality control entrusted to the High Court of Cassation and Justice in the United Sections, the election of the members of the Constitutional Court among the judges of the High Court, the inclusion of the Constitutional Court within the judiciary sphere as a separate section, the returning to the previous version of the Constitution of 1991 before the review (the last part the most accessible one). Whatever solution is adopted, the choice of the constitutional judges will include criteria that will ensure a truly high professionalism but also a certain and a serious independence.

[30] See Dan Claudiu Dănişor „Drept Constituţional şi instituţii politice, vol. I, Teoria generală. C.H. Beck Publishing House, Bucharest, 2007, p. 645.

[31] See Tudor Drăganu, "Efectele juridice ale deciziilor Curții Constituționale în lumina prevederilor Constituției revizuite", in the Review of Public Law no. 1/2004, p. 95.