

CONSTITUTIONAL JUSTICE – BETWEEN THE ROLE OF GUARANTOR OF THE SUPREMACY OF THE CONSTITUTION AND THE ROLE OF PROTECTOR OF THE FUNDAMENTAL RIGHTS AND FREEDOMS. CASE STUDY: ROMANIA

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ABSTRACT: *Among the variety of legal means of protection of fundamental rights and freedoms, constitutional justice deserves another position and recognition - because that was proved. The constitutionality control is a means of protecting and promoting fundamental rights and freedoms. The supremacy of the Constitution is the result of several factors: the Constitution gives the power and authority to those who rule; it determines the responsibilities of public authorities; it governs the relations between the state and citizens determining their fundamental rights, freedoms and obligations; it shapes the political, ideological values which are the base of the organization and functioning of the political system; it underlies and guarantees the law and represents the crucial mark for assessing the validity of all legal actions and deeds¹. Thus, ensuring the supremacy of the Constitution, by consequence, these rights and freedoms are also guaranteed and protected. The main means to guarantee the supremacy of the Constitution and, therefore, the human fundamental rights and freedoms, is the exercise of constitutional control.*

KEYWORDS: *control of constitutionality, unconstitutionality exception, protection of fundamental rights and freedoms.*

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Among the variety of legal means to protect the fundamental rights and freedoms that exist, the constitutional justice deserves – as it has proven this – another recognition.

We believe that the exercise of constitutional control (the act of constitutional justice) may become one of the most effective legal means to protect the fundamental rights and freedoms because:

- primarily, through the prior constitutional control exercised over the laws before promulgation, it may stop – preventively – the entry into force of certain legal rules that

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¹ Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român - tratat*, Servo-Sat Publishing House, Arad, p. 221.

would assume harm – any kind of harm – brought to any fundamental right or freedom of a person;

- secondly – still preventively – by exercising the constitutional control on treaties and other international agreements, it stops the instillation into the domestic law of some provisions that might harm the fundamental rights and freedoms. The priority rule regarding the enforcement of *the international legal norms* applies only within the human rights framework and only if the domestic law does not contain more favorable provisions;

- third, by exercising the posterior constitutional control - *sentencing* - through the objection of unconstitutionality regarding the laws and ordinances of the government, the constitutional justice can punish any prejudice or harm brought through normative means to the rights and freedoms, when it is found that by the way of implementing them, the rights and freedoms are harmed. Interference and damage may occur through material acts and deeds of execution. Thus, by its activity, the Constitutional Court must act as a real *protector of human rights and fundamental freedoms*, sanctioning any regulatory provision inconsistent with the Constitution in this regard, with particular reference to: the free access to justice (Article 21 of the Constitution); equality (Article 16 of the Constitution); the prohibition of discrimination (Article 4 of the Constitution); the right of children to special protection (Article 49 of the Constitution); the right to property (Article 44 of the Constitution); the right to inheritance (Article 46 of the Constitution); the right of defense (Article 24 of the Constitution); the right to free movement (Article 25 of the Constitution); the right to employment and social protection of labor (Article 41 of the Constitution); the right to their own image (Article 26 the Constitution).

Today, perhaps more than ever, the need for protection by effective means not only the life and liberty of the individuals but the whole constellation of fundamental human rights and freedoms is real, acute and imperative. Since the list of those rights and freedoms of man constantly adds up – in line with the development of civil society – the means, instruments and mechanisms of protection and guarantee must adapt continuously and effectively.

On principle, the protection of fundamental human rights and freedoms is achieved:

A. through international documents (documents which guarantees the human rights and freedoms²;

² See Victor Ducelescu, *Protecția juridică a drepturilor omului*, Lumina Lex Publishing House, 1998, pp. 61-87; „Magna Charta Libertatum” (1215, Great Britain), “Petition of Right” (7 June 1628, Great Britain), „Habeas Corpus Act” (26 May 1679, Great Britain), „Bill of Rights” (13 February 1689, Great Britain), “Virginia Declaration of Rights” (12 June 1776), Declaration of Independence” (USA, 4 July 1776), “Declaration of the Rights of Man and of the Citizen” (26 August 1789, France), “Charter of the United Nations” and “Universal Declaration of Human Rights” (UN General Assembly of 10 December 1948 – includes two categories of rights: a. civil rights and political rights and b. cultural, social and economical rights), “International Covenant on Economic, Social and Cultural Rights” (3 January 1976), “International Covenant on Civil and Political Rights” (23 March 1976), “International Convention on the rights of the Child” (20 November 1989), “The European Convention on Human Rights” (4 November 1950, The Council of Europe) and the Additional Protocols of ECHR, “Charter of the Fundamental Rights of the European Union” (7-10 November 2000, Nice, European Parliament); “Charter of Fundamental Rights” (brings together in a single text all the personal, civil, political, economical rights of which the European Union enjoys and which became compulsory once Treaty of Lisbon entered into force (http://ec.europa.eu/justice/fundamental-rights/index_ro.htm). Along with the entry into force of the Lisbon Treaty, the European Union joined the European Convention on Human Rights and therefore the

B. through national normative documents (constitution, laws, other regulations) which regulates and guarantees these rights and freedoms;

C. by establishing principles of the ideal value or guiding ideas (are considered as the *general principles of fundamental rights and freedoms*)³.

D. by express and restrictive regulation for the restriction of exercising certain fundamental rights and freedoms. For example, the Constitution of Romania allows the restriction of exercising certain rights and freedoms⁴, only as an *exceptional measure with temporary feature*⁵. According to Article 53 of the Fundamental Law of Romania, the restriction can be achieved only through organic law, conditioned (only if necessary, applied non-discriminatory) and only for the protection of national security, the defense of public order, the health or public morals, protection of the human rights and freedoms, the roll on of criminal investigation, the prevention of the consequences of a disaster, natural disasters or extremely severe catastrophe.

E. through the establishment and organization of a specific institutional framework (the European Court of Human Rights and other international jurisdictions, national courts of common law and constitutional courts). Thus, in order to put into practice the effective protection, specific means of action are required. Among them, the free access to justice is perhaps the most effective. In the broader context of *justice*⁶ - and then in a much broader context, that of a constitutional system and of a democratic regime – a special place is occupied recently by the constitutional justice, respectively by the instrument for achieving it – a constitutional jurisdiction.

Outlining the concept of human rights was, in fact, a synthesis operation, consisting of generalizing ideas enshrined in different countries, in legal documents with a rich moral and political content that have withstood time⁷. By regulating these ideas and by transposing them into legal rules under the concept of “fundamental rights and freedoms” the legal means to protect the citizen, as an individual, have basically outlined, because, it was argued that even in this individual position the citizen is the most vulnerable⁸ in its relations with the state⁹. Fundamental rights and freedoms must be regarded and regulated

European Court of Human Rights from Strasbourg became competent to control the acts of European Union. (http://ec.europa.eu/justice/fundamental-rights/index_ro.htm).

³ Ioan Muraru, Simina Tănăsescu, *Drept constituțional și instituții politice*, vol. I, 12th edition, All Beck Publishing House, Bucharest, 2005, pp. 159-164: 1. *The principle of universality*. 2. *The principle of non-retroactivity*. 3. *The principle of equality in rights*. 4. *Free access to Justice*. 5. *The principle according to which public offices and dignities may be filled by people who have Romanian citizenship and residence in Romania*. 6. *The protection of Romanian citizens abroad and their duties*. 7. *The principle of priority regarding international regulations concerning human rights and freedoms*. 8. *The exceptional feature of restriction for certain rights and freedoms*.

⁴ For details, see Dan Claudiu Dănișor, *Considerații privind reglementarea constituțională a restrângerii exercițiului unor drepturi sau a unor libertăți*, in „Noua Revistă de Drepturile Omului”, no. 2/2008, pp. 3-22.

⁵ For example, reducing wages of public employees by 25%.

⁶ About the concept of independent justice – in extenso see Lucian Chiriac, *L'organisation d'une justice indépendante – partie du mécanisme de construction de l'État de droit*, in the Review „Juridical Current”, no. 2/2013, pp. 21/35.

⁷ Constanța Călinoiu, Victor Duculescu, *Drept constituțional și instituții politice*, Lumina Lex Publishing House, Bucharest, 2005, p. 148.

⁸ *Drepturile și libertățile individuale – componentă esențială a noii Constituții a României*, editorial in the Review „Dreptul” no. 2/1992, p. 3.

⁹ Rodoljub Etinski, *O analiză retrospectivă și prospectivă a drepturilor omului în Uniunea Europeană*, in „Noua Revistă de drepturile omului”, no. 3/2008, pp. 3-18.

as attributes to the personality of individuals considered both as individual persons but also as members of the community in which they are integrated¹⁰. Because the most important human rights and freedoms, those considered essential in order to be better protected, are provided and guaranteed by the very text of the Constitution by exercising the constitutional justice. Thus, ensuring supremacy of the Constitution shall guarantee, therefore, also the ensuring and protection of these rights and freedoms.

Since the beginning of the shaping of *constitutionality control system*, this control was closely linked to the expression and inviolability guarantee of the general public will. No wonder that the idea of this kind of control – of constitutionality – represents a way of “implementing the principle of separation of the constituent power and the constituted power. So that this separation principle does not remain like words that beat the wind, the power established must not ignore, modify or alter the will of the constituent power without abiding the consequences. In other words, there must be a control of the established power and that control can be exercised even by the constituent power itself, ie by the people. It’s that kind of control, whose right to practice comes from the right to resistance to oppression – natural and inalienable human right (Article 2 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789)”¹¹.

The supremacy of the Constitution is the result of several factors: the Constitution legitimizes the power and confers authority to the government, determines the jurisdiction of public authorities, governing relations between state and citizens enshrining their fundamental rights, freedoms and duties, outlines the political, ideological values which stand at the base of the organization and functioning of the political system, underlie and ensures the law order and is the crucial landmark for the appreciation of validity of all documents and legal facts¹². Today, the supremacy of the Constitution is a “truth universally consistent” accepted not only by the modern constitutional law¹³, but by others, too. Recently, the doctrine mentioned other foundations of the constitutional justice: the general will¹⁴; the democracy or the protection of the fundamental rights and freedoms of man¹⁵; the downfall of the political representation, regarding the affirmation of the protection of human rights and the limiting power¹⁶. When the concept of *constitutional supremacy* appeared, the issue of protecting it also appeared, so that various means and procedures to ensure compliance with the Constitution have outlined: the fundamental duty to respect the Constitution, constitutional rigidity, overall control for compliance with the Constitution, the constitutional justice (and, subsequent to this concept, the control of the constitutionality of laws), to ensure “the supremacy of the Constitution” becoming thus, also the objective of the constitutionality control. Today, the

¹⁰ *Drepturile și libertățile individuale – componentă esențială a noii Constituții a României*, editorial in the Review „Dreptul” no. 2/1992, p. 5.

¹¹ Elisabeth Zoller, *Droit constitutionnel*, Presses Universitaires de France, Paris, 1998, p. 97 (our translation).

¹² Ion Deleanu, *Instituții și proceduri constituționale – în dreptul comparat și în dreptul român - tratat*, p. 221.

¹³ Sorin Popescu, Elena Simina Tănăsescu in *Constituția României – comentariu pe articole*, coordinator Ioan Muraru, Elena Simina Tănăsescu and others, C.H. Beck Publishing House, Bucharest, 2008, p. 1475.

¹⁴ *The adopted law does not express the general will only if it complies with the Constitution* – Philippe Blachér, *Contrôle de constitutionnalité et volonté générale*, Presses Universitaire de France, Paris, 2001 (our translation).

¹⁵ Claudia Gilia, *Teoria statului de drept*, C.H. Beck Publishing House, Bucharest, 2007, p. 267, p. 268.

¹⁶ Dan Claudiu Dănișor, *Drept constituțional și instituții politice*, vol. I, *Teoria generală*, Publishing House, Bucharest, 2007, p. 646.

constitutional justice is defined as “a set of institutions and techniques, through which supremacy of the Constitution is assured with no restriction”¹⁷.

For example, the Romanian Constitutional Court¹⁸, in the exercise of the constitutional control, related also to the provisions of the *Convention for the Protection of Human Rights and Freedoms* (and its additional protocols)¹⁹, basing their decisions on certain texts of the Convention²⁰ or invoking case decisions of the European Court of Human Rights to justify their judgment. The extension of the relation sphere of the obligation of conformity is found in connection with the French constitutional jurisdiction. The Constitutional Council exercises a constitutional control of legislative acts in relation to what is called “constitutional block” and a set of rules of constitutional value (*including those providing and guaranteeing fundamental rights and freedoms*) that require respect for the legislative power. By Decision no. 71-44 of 16 July 1971, the Constitutional Council declared it an unconstitutional provision not because it was contrary to the text of the Constitution, but because it violated “a fundamental principle recognized by the laws of the Republic” (the freedom of association governed by the law of 1 July 1901), thus relying on the *Preamble* which refers to the Bill of Rights of 1789 and the Preamble of the Constitution of 1946 (which reaffirms the rights enshrined by the fundamental principles acknowledged by the laws of the Republic). Thus, the Constitutional Council has incorporated within the “constitutionality block” many principles that imposed respect for legislature. This decision brought a change in the conditions for exercising the constitutional control, which therefore becomes a “substantial control”, *ie* the Constitutional Council, since then, has been put more often in a position to rule on the substance (content) of laws. Through its jurisprudence, the French Constitutional Council contributed to the establishment of the “constitutional block”: the Constitution of 1958; the French Declaration of Human Rights of 1789 (mostly on individual freedom, equality and ownership); the Preamble to the Constitution of 1946 (regarding the principles of political, economic and social activities, necessary nowadays, such as the right to strike, the right to health, right to asylum); fundamental principles acknowledged by the laws of the Republic (for example, freedom of association, the right to education, the right to defense, independence for administrative jurisdiction); principles with constitutional value (imposed by the Constitutional Council, and the principle of continuity of the public services). Thus the Constitutional Council gave legal significance to a large number of

¹⁷ Olivier Duhamel, Yves Mény, *Dictionnaire constitutionnel*, Presses Universitaire de France, 1992, p. 556 (our translation). In a similar manner it was defined as being „the set of institutions and techniques that ensures the supremacy of the Constitution”, noting that the concept of „constitutional justice” should not be confused with the „constitutional control”, this being a single procedure – see Dan Claudiu Dănișor, *op.cit.*, p. 623.

¹⁸ Consideration regarding the legal nature of the Constitutional Court of Romania – *in extenso* see Lucian Chiriac, *Some consideration regarding the legal nature of the Constitutional Court of Romania*, in the Review „Juridical Current”, no. 4/2012, pp. 14-20.

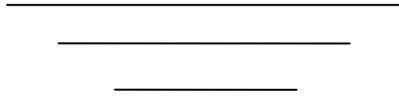
¹⁹ Adopted but the European Council on 4 November 1950 and signed by Romania on 7 October 1993.

²⁰ From the Constitutional Court jurisprudence it results that the constitutional Court has found violations of certain provisions of the Convention for the Protection of Human Rights and Freedoms by various laws or ordinances subjected to the control of constitutionality.

reference regulations that allowed the exercise of a very tight control of the laws passed by Parliament²¹.

In conclusion, *the need to respect values and rules such as freedom, equality, law, representation, separation of powers, legality and eventually, supremacy of the Constitution*, have created mechanisms for their protection. Thus, the constitutionality control should be considered a consequence and a guarantee of the supremacy of the Constitution that through its content and its position orders to the entire legislation²².

We believe that the main quality of a special constitutional jurisdiction is showed by the fact that it is an independent legal institution, on its own, lying completely outside the three “classical” powers of the state. And this non-affiliation, together with neutrality and impartiality (specific qualities of justice) ensures the independence that the competent authority needed in order to carry out the constitutional control.



²¹ Simon-Louis Formery, *La Constitution commentée*, 11^e édition, Edition Hachette Supérieur, Paris, 2007, pp. 113-114 (our translation); *Code constitutionnel*, commenté et annoté par Michel de Villiers, Thierry S. Renoux, Éditions Litec, Paris, 2001, p. 500.

²² Constanța Călinoiu, Victor Duculescu, *Drept parlamentar*, Lumina Lex Publishing House, Bucharest, 2006, p. 250.