EVOLUTION AND PERSPECTIVES OF CONSTITUTIONAL JUSTICE IN ROMANIA

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Abstract

The supremacy of Constitution is a reality also due to the role of the Constitutional Court, as defined in article 142 paragraph (1) of the Constitution. The Constitutional Court's powers contribute essentially to the achievement of the lawful state and, therefore, a historical analysis of the evolution of this important constitutional institution is likely to highlight the legitimacy of the constitutionality control of the laws in Romania, but also its perspectives.

In our analysis, we are debating for the concept of constitutional justice, regarded from a historical point of view, which includes the main attribution of a constitutional court, namely that of controlling the constitutionality of the laws. From this perspective, we point out the main evolution moments of the constitutionality control of the laws in Romania, analyzing briefly the particularities of the constitutional regulations during the evolution of constitutional justice in our country. At the same time, we emphasize the contemporary features of the control of constitutionality of the laws in Romania, and we argue that guaranteeing the supremacy of the Constitution, through constitutionality control, must be seen in the broad sense and in terms of the attributions of the courts in this field.

We believe that the role of the Constitutional Court must be amplified by new powers, including through future revisions of the Fundamental Law, as this creates new guarantees regarding the reality of the principle of separation and balance of powers in the state, and obviously the guaranteeing of the supremacy of the Basic Law.

Keywords: *Constitutional justice, control of constitutionality of the laws, historical stages of the control of constitutionality of the laws in Romania, contemporary features of constitutional justice, new proposals for ferenda law*.

1. Introduction

The supremacy of Constitution would remain a mere theoretical issue if there were no adequate safeguards. Undoubtedly, the constitutional justice and its particular form, the control of constitutionality of laws, represent the main guarantee of the supremacy of Constitution, as expressly stipulated in the Fundamental Law of Romania.

Professor Ion Deleanu appreciated that "the constitutional justice can be considered, in addition to many others, a paradigm of this century."[1] The birth and evolution of constitutional justice is determined by a number of factors to which the doctrine refers, among which we mention: the man, as a citizen, becomes a cardinal axiological reference of the civil and political society, while the fundamental rights and freedoms only represent a simple theoretical discourse, but a normative reality; it is done a reconsideration of democracy in the sense that the protection of the minority becomes a major requirement of the lawful state and, at the same time, a counterpart to the principle of majority; "the parliamentary sovereignty" is subjected to the supremacy of the law and, in particular, to Constitution, therefore the law is no longer an infallible act of Parliament, yet is it conditioned by the norms and values of the Constitution; and not the least, the reconsideration of the role and place of the constitutions in the sense of their qualification, especially as "fundamental foundations of the governed ones and not of the governors, as a dynamic act, in a continuous modeling and act of society".[2]

2. Content

The term "constitutional justice" or "constitutional jurisdiction" are controversial in the literature in specialty, the control of constitutionality of laws being preferred in particular. However, the notion of "constitutional justice" appears in Kelsen's work as "the jurisdictional guarantee of Constitution"[3]. Eisenmann also considers it to be "that form of justice or, more precisely, the jurisdiction that pertains to constitutional laws", without which the Constitution would be but a mere "political program, only binding morally". The same author makes the distinction between constitutional justice and constitutional jurisdiction. The "Constitutional justice" is the form through which the distribution of prerogatives between ordinary legislation and constitutional law is guaranteed, and the

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[1] Ion Deleanu, *Constitutional justice* (Bucharest: Lumina Lex Publishing House, 1995), 5.
[2] Idem., 5-6.
[3] H. Kelsen, *"*La garantie jurisdictionnelle de la Constituion", *Revue de Droit publique* (1928): 197 and next.

"constitutional jurisdiction" refers to the authority through which the constitutional[4] justice is achieved.

In Romanian literature, the notion of "constitutional justice" has come about mainly due to the contribution made by Professor Ion Deleanu[5] in this field. Without a thorough analysis of this concept, we consider that the constitutional justice is a legal category of special significance whose constitutional constituents are as follows:

a) designates all the institutions and procedures through which the Constitution supremacy is achieved.

b) a state body competent to carry it out with the duties provided by the Constitution and the law;

c) a set of technical means and forms of implementation with specific and exclusive features;

d) the purpose of the constitutional justice is to ensure the supremacy of Constitution.

There is no identity between the concepts of constitutional justice and, respectively, the constitutionality control of laws. The latter one is only a part of the first.

In the sense of the above definition, the general features of the constitutional justice can be identified:

- it is a genuine jurisdiction but having some peculiarities over other forms of jurisdiction having in view this one's purpose;
- it may use common procedural rules, but also the own procedural rules consecrated in the Constitution, laws and regulations determined by the nature of the constitutional litigation;
- can be done by a specialized state body (political, judicial, or dual-nature), or by the common law courts;
- it is an exclusive justice because it has the monopoly of the constitutional litigation.
- it is not always concentrated because the common law courts may have perspectives in the area of constitutional litigation:
- the independence of the constitutional justice consists in the existence of a "constitutional statute" of the body implementing this type of jurisdiction, consisting in the independent statutory and administrative autonomy vis-à-vis of any public authority; the verification of its own competence, the prevalence of abuses of constitutional justice over any other judicial decisions: the independence and immovability of the judges and, in some cases, their designation using criteria other than those relating to the recruitment, appointment and promotion of career magistrates;

The control of constitutionality of the laws is the main form of constitutional justice and is a basis for democracy guaranteeing the establishment of a democratic government that respects the supremacy of the law and Constitution.

George Alexianu considered that legality is an attribute of the modern state. The idea of legality in author's conception is formulated as follows: all the state organs operate on the basis of a lawful order established by the legislator, which one must be respected.

The same author, referring to the supremacy of Constitution, fully affirmed and in relation to today's realities: "When the modern state organizes its new appearance, the first idea that concerns it is to stop the administrative abuse, hence the invcention of the constitutions and by judicial means the establishing of the legality control. Once this abuse is established appears a new one, a more serious one, that of the Parliament. Then are invented the supremacy of Constitution and various systems for guaranteeing it. The idea of legality thus gains a strong strengthening leverage"[6].

An important aspect is also to define the notion of control of the constitutionality of laws. In the legal doctrine[7] was emphasized that the issue of this attribution must be included in the principle of legality. Legality is a fundamental principle of organizing and operating the social and political system. This principle has several coordinates: the existence of a hierarchical legal system on top of which is the Constitution. Therefore, the ordinary law must comply to Constitution in order to fulfill the condition of legality; the state bodies must carry out their duties in strict compliance with the observance of the competences established by the laws; the elaboration of the normative acts should be done by competent bodies, after a predetermined procedure in compliance with the provisions of the higher normative acts with legal force and with the observance of the law and Constitution by all state bodies.

In the doctrine, the constitutionality control of the laws was defined as: "The organized activity for verifying the conformity of the law with the constitution, and from the point of view of the constitutional law it contains rules regarding the authorities competent to make this verification, the procedure to follow and the measures that can be taken after this procedure[8] has been completed."

The analysis of the definition shows the complex significance of the constitutionality control of the laws. This is an institution of the constitutional law, which is the set of legal norms relating to the organization and functioning of the authority competent to exercise the control, as well as the set of legal rules having a

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[4] For development see Ch. Eisenmann, *La Justice constitutionnelle de la Haute Cour Constitutionnelle d'Autriche*, (Paris: PUAM et Economica, 1986), 34.

[5] For developments see Ion Deleanu, *quoted work,* 9-12.

[6] George Alexianu, *Constitutional Law* (Bucharest: Schools' House Publisher, 1930), 71.

[7] On this meaning see Ion Deleanu, *Constitutional institutions and procedures* (Bucharest:: C.H.Beck, 2006), 810; Ioan Muraru and Elena Simina Tănăsescu, *Constitutional law and political institutions*, Vol. II (Bucharest: C.H.Beck 2014), 191; Marius Andreescu and Andra Puran, *Constitutional law. General theory of the State, Second edition* (Bucharest: C.H.Beck, 2017), 205-206.

[8] Ioan Muraru and Elena Simina Tănăsescu, *quoted work*, 191.

procedural nature that regulate which ones may be disposed by a constitutional court.

At the same time, it is also an organized activity guaranteeing the supremacy of Constitution by verifying the conformity of the norms contained in the laws and other normative acts with the constitutional regulations.

In essence, the control of the laws' constitutionality requires the verification of laws' compliance as a legal act of the Parliament, but also of other categories of normative acts with the norms contained in the Constitution. The compliance must exist both formally (the competence of the issuing body and the elaboration procedure) as well as from the material point of view (the competence of the norm in the ordinary law must be in line with the constitutional norm).

There are several factors that explain the emergence and evolution of the constitutionality control of laws, of which we mention:

a) *The inconsistency between Constitution and the laws*. This compliance of the law with the Constitution is not a given or an absolute presumption. Both theory and practice have shown that due to the dynamics and peculiarities of the legislative process, there may be inconsistencies between the law and Constitution. Thus, by giving effect to groups of political interests, which usually belong to the majority, the Parliament can adopt a law that contravenes the constitutional norms. For the same reason, the government could adopt unconstitutional normative acts.

In other cases, the legislative technique regulated by the Constitution may not be respected by the Parliament, which would lead to inconsistencies between the law and Constitution.

b) *The necessity of interpreting the Constitution and the laws in view of establishing the conformity of the right with the constitutional norms.*

The normative law-making activity must be continued with norms implementing work; in view of their application, the first logical operation to perform is their interpretation.

Both the Constitution and the law are presented as a set of legal norms, but these norms are expressed in the form of a normative text. Therefore, what is the object of interpretation are not the legal norms, but the text itself of the law or Constitution. A legal text may contain several legal rules. From a constitutional text a constitutional norm can be deduced by interpretation. The text of Constitution is drafted in general terms, which influences the degree of determination of the constitutional norms. By interpreting are identified and determined the constitutional norms.

It should also underline that a Constitution may contain certain principles which are not clearly expressed *expresis verbis*, but they can be inferred through the systematic interpretation of other norms.

In the sense of the above, the specialized literature stated: "The degree of determination of the constitutional norms through the text of the fundamental law can justify the necessity of interpretation. The norms of the Constitution are well suited to the evolution of their course, because the text is inexorably inaccurate, formulated in general terms. The formal superiority of Constitution, its rigidity, prevents its revision at very short intervals, and then interpretation remains the only way to adapt the normative content, usually older, to the constantly changing social reality. The meaning of the constitutional norms being by their very nature, that of maximum generality, its exact determining depends on the will of the interpreter." [9]

The scientific justification of interpretation results from the need to ensure the effectiveness of the norms contained both in Constitution and the laws, by means of the institutions which carry out mainly the activity of interpreting the norms enacted by the author.

These institutions are primarily the judging courts and constitutional courts.

Verifying the conformity of a normative act with the constitutional norms, institution that represents the constitutionality control of the laws, does not mean a formal comparison or a mechanical juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures for interpreting both the law and Constitution.

Therefore, the necessity of interpreting the Constitution is a condition of its application and for ensuring its supremacy. The constitutionality control of the laws is essentially an activity for interpretation of both the Constitution and the law. It is necessary to have independent public authorities that have the competence to interpret the constitution and in this way to examine the conformity of the law with the Constitution. Within the European model of constitutional justice, these authorities are the Constitutional Courts and tribunals.

c) *The applying of the principle of separation and balance of powers in the state*. *Avoiding the abuse of parliamentary power*

The limits of Parliament's power to legislate are determined by the constitutional norms determining the competence and the legislative procedure. Another limit is the need to respect the supremacy of Constitution in terms of the contents of the norms enacted by the Parliament.

Consequently, the constitutionality control of the laws is the practical way for verifying the compliance with the Constitution's supremacy by the Parliament and it constitutes a counterpart to its powers in the legislative matter.

The constituent legislator and the ordinary legislator must find the most appropriate procedures to respond to two major requirements: first, the need not to obstruct the exercise of the legislative function of the

[9] Ioan Muraru and Mihai Constantinescu and Elena Simina Tănăsescu and Mihai Enache and Gheorghe Iancu, *Interpretation of Constitution, Doctrine and Practice* (Bucharest: Lumina Lex, 2002), 67.

Parliament by conferring exaggerated powers in matter to other state authorities, and, on the other hand, the need to ensure, within strictly defined limits, the compulsoriness of the decisions of some constitutional courts for the Parliament.

The necessity of the control of constitutionality of the laws is in fact the expression of the need to guarantee the supremacy of Constitution in relation to the activity of the Parliament.

If the chronological character is concerned, the constitutionality test was first made in England by Eduard Cohe through his judgment decision in 1610 in Bonham case, as chief justice. The usefulness of constitutionality control was then demonstrated by Alexander Hamilton in the U.S. in 1780: "If there were to be a pre- reconcilable difference between the laws and Constitution, it would of course be preferable to the one that has a superior validity and compulsoriness or, in other words, the constitution must be preferred to the law ... No legislation act contrary to Constitution can be valid."[10]

The one who frequently raises the issue of controlling the constitutionality of laws by a political body is the famous French lawyer and politician Siéyes. In his speech in the 1791 Convention of France, he called for the creation of a political body that would cancel out of office or at the request of those concerned, of any act or any law that would be contrary to Constitution. Moreover, this organ even had a Constituent Assembly role.

From a historical perspective, it is of particular importance the judicial control of constitutionality established in the United States at the beginning of the nineteenth century, although the Constitution does not regulate procedural rules.

The evolution of the constitutionality control of the laws in the U.S. can be divided into two periods. The first period begins with the adoption of the Constitution in 1787 and ends in 1886.

During this period, in the matter of constitutionality, the judges verified in particular whether the ordinary legislator respected the competence conferred by Constitution in the sense of not being legally enforced on matters prohibited through constitutional norms. The judges could not annul a law as unconstitutional, but could only to implement its application in the case before the court.

The Supreme Court pronounces in the *Marbury affair vs. Madison*, for the first time in a case of this nature, declaring the federal Constitution to be the supreme law of the state and removing an act of the Congress contrary to the federal Constitution. The decision of the Court is written by Judge John Marshall and forms the basis on which is based the American jurisprudence on constitutionality control.

The reasoning attributed by the American judge is the following: the judge is meant to apply and interpret the laws. The Constitution is the supreme law of a state that must be applied with priority to any other law. The Constitution, being a law, is to be interpreted and applied by the judge, including to a particular case forming the subject of the judgment.

In case the law does not comply with constitutional norms, the latter ones will be applied because of the supreme character of the Constitution.

The second period begins in 1883 with a famous decision of the Supreme Court in Massachussets in the Wiegman litigation. The judges' powers increase in matter of constitutionality. The Supreme Court is no longer confined to verifying a law in terms of respecting the legislature's constitutional competence or in regard to the observance of procedures. Starting with this moment, and until now, the justice in the matter of constitutionality control examines the law in terms of its opportunity, its rationality and its economic and social justification. Thus, through the procedure of constitutionality control, the judiciary power examines the entire activity of the Parliament and removes all measures that are deemed to be contrary to the legal order in the state. In this way, justice is a guarantor of the supremacy of Constitution and of the observance of the principle of separation of powers in the state, "as the control and mutual supervision of the powers are the very essence of the existence of a state"

But the American model of constitutional justice is not without criticism. Among the most significant ones we mention:

a) verifying the compliance of the law with the constitutional norms is a constitutional litigation that differs from the ordinary legal disputes, the latter ones being the object of settling of the common or specialized courts of law. In contrast to these, a constitutional litigation can only be solved by a constitutional judge;

b) the legal effects of the constitutionality control occur only between the parties involved in the process. In the absence of a parliamentary procedure of law reviewing, we reach the paradoxical situation to let in force an unconstitutional law;

c) the ordinary jurisdictional procedure is incompatible with the specificity of a constitutional litigation;

d) There is the danger of transforming the justice into a judges' ruling, and thereby breaking the principle of separation of the powers in the state. "The judiciary authorities become, unwillingly a branch of the legislative power, or even worse, a real governing power, an authority above the others." [11]

Therefore, several theoretical, institutional and political considerations have led to the establishment of a control of constitutionality of the laws through a specialized body, which is the European model in this field.

[10] George Alexianu, *quoted work*, 72.
[11] Ion Deleanu, Constitutional Justice, quated work, 38.

From these considerations, shown in the literature in specialty[12] we can mention two:

a) the political regime of a parliamentary or semi-presidential type existing in most European countries leads to a dominant position of the parliamentary majority, that fulfills the governing. The judicial reviewing of the constitutionality of laws is not a genuine counterpart related to the power of the Parliament. It is necessary to carry out the constitutionality control of the laws through a specialized body, which is, as the case may be, either a counterbalance to a parliamentary majority too strong – expressively, volunteering or a substitute for a non-existent parliamentary majority.

b) the control of constitutionality of the laws through a specialized body ensures the correct acceptance and application of the principle of separation of the powers in the state. In this sense, Hans Kelsen[13] said: "The guaranteeing of the Constitution implies the possibility of canceling the acts contrary to it, and not by the body that adopted them, which is considered a free-creator of law, and not a law-enforcement body, but by another organ, different and independent of the legislative one and any other authority".

The European model of constitutional justice is institutionally characterized in the constitutional courts or tribunals.

In the interwar period, this model was noted in Austria (1920), Czechoslovakia (1979), Spain (1931) and Ireland (1938).

After the Second World War are established the constitutional courts and tribunals in most European countries: Italy (1948), Germany (1949), Turkey (1961), Portugal (1976), Spain (1978) etc.

Among the Eastern European countries that have this model of constitutional justice we mention: Romania, Poland, Hungary, Czech Republic, Croatia, Macedonia, Russia, Ukraine, Lithuania, etc.

In case of France, the constitutionality control is carried out by a dual, political and judicial body, the French Constitutional Council. This is made up of the former presidents of the republic, still living, as well as of nine members appointed for a 9 years unique mandate. The members of the Constitutional Council shall be appointed as follows: three members by the President of the State, three by the Senate President and other three by the President of the National Assembly. The President of the Constitutional Council is appointed by the decision of the President of the Republic. In the competence of this Council fall other responsibilities outside the control of constitutionality of the laws.

In our country, the control of the constitutionality of laws has developed marked by the national particularities and the successive application of the two models presented above.

Thus, Cuza's statute established in article 12, that the state and constitutional laws are placed under the protection of the weighing body. Therefore, this Chamber of Parliament could verify the conformity of a law with the Constitution.

The 1866 Constitution did not regulate the control of constitutionality of the laws.

However, the provisions of Article 93 of the Constitution, according to which the Lord "sanctions and promulgates the laws" and that, he "may refuse his sanction." Consequently, the head of state could refuse to promulgate a law if he considered it unconstitutional. Obviously, it is not a genuine control of constitutionality of the laws, but it is a precursor to such verification. As long as the 1866 Constitution was in force, the head of state never made use of this procedure.

The control of constitutionality of the laws done by a judging court rather than by a specialized institution, different from the judiciary power, has also been accepted on the European continent. The constitutional history mentions a Romanian priority in this case. Thus, during the period 1911-1912, the Ilfov Tribunal and then the High Court of Cassation and Justice had the right to verify the constitutional conformity of the laws in the litigation known as the "trams affair" in Bucharest.

Interestingly, the reasoning used by Ilfov Tribunal and by the High Court of Cassation and Justice in motivation of the possibility to carry out the Constitutionality control on a pretorian basis. In essence, the recitals were the following: 1) The court did not of its own motion take the jurisdiction to rule on the constitutionality of a law and to annul it, since such a procedure would have constituted an interference of the judicial power into the powers of the legislature. As a consequence, the court assumed this competence because it was asked to verify the constitutionality of a law; 2) On the basis of the attributions that are given, the judiciary power has as its main mission the interpretation and application of all laws, whether ordinary or constitutional.

If a law invoked is contrary to the Constitution, the court can not refuse to settle the case; 3) There is no provision in the 1866 Constitution which specifically prohibits the right of the judiciary power to check whether a law is in conformity with the Constitution. The provisions of Article 77 of the Constitution are being invoked, according to which a judge, according to the oath, is obliged to apply the laws and the Constitution of the country; 4) unlike ordinary laws, the Constitution is permanent and can only be revised exceptionally. Being the law with supreme power, the Constitution is imposed by its own authority and therefore the judge is obliged to apply it with priority,

[12] See Ion Deleanu, Constitutional Institutions and Procedures, quated work, 805; Ioan Muraru and Elena Simina Tănăsescu, quoted work, 269.

[13] H. Kelsen, The pure doctrine of the law (Bucharest: Humanitas, 2000), 110-111.

including in case where the law on which the litigation is settled is contrary to the Constitution[14].

The decisions of Ilfov Tribunal and the High Court of Cassation and Justice were well received by the experts of the time. Here's a short comment: "This decision was a great satisfaction for all people of law. It is a great step forward in advancing this country towards progress, because it consecrates the principle that the Constitution of this state, its foundation, the palace of our rights and freedoms, must not be despised by anyone. We are proud that it has been given to our justice the privilege to show even to the justice of the Western countries the true way of progress in the matter of public law."[15]

For the first time, the constitutionality control of the laws was regulated by the Romanian Constitution in 1923, by article 103, adopting the American model. "Only the Court of Cassation in unified sections has the right to judge the constitutionality of the laws and to declare inappropriate those that are contrary to the Constitution. The judgment on the unconstitutionality of laws is limited to the case alone."

Consequently, the control of constitutionality of the laws was the exclusive competence of the Court of Cassation in unified sections. It could be exercised only by way of the exception of unconstitutionality invoked during the trial of the litigation. At the same time, the pronounced ruling had legal effects only between the parties in the trial and had the power of a *rex judecata* only in the case solved.

Also, the constitutionality of laws is judged after the litigation has passed all levels of jurisdiction. This procedure was an extraordinary way to appeal a judgment. The provisions of article 29 of the Law of the Court of Cassation stipulated only one exception when the applicant accepted the suspension of the trial of the case matter so that for the Cassation Court to decide in advance on the constitutionality of the law whose application was required.

At the same time, through these constitutional regulations, the transition from the "diffuse" judicial control, assumed by all courts, to a "concentrated" judicial control, assigned to a single court, namely the Court of Cassation, was made in unified sections. Also, the decision given in that procedure has effects only on the case and between the parties in litigation, and could not have legal effects *"erga omnes*".

The constitutionality control of the laws was governed identically by the Romanian Constitution in 1938, by the provisions of article 75.

In the post-war period, the constitutionality control of the laws was practically no longer regulated. The provisions of article 24 letter j) of the 1952 Constitution stated that the supreme representative body, the Grand National Assembly, has in its competence "the general control over the implementation of the Constitution", which included the right to examine the law's compliance with Constitution.

Similarly, the provisions of Article 43 (point 5) of the Constitution adopted in 1965 established the competence of the Grand National Assembly to exercise general control over the implementation of Constitution, but these provisions regulated more specifically the competence of the supreme representative body in respect of the constitutionality control of laws: "Only the Grand National Assembly decides on the constitutionality of the laws ".

The constituent lawmaker of the post-war period of the totalitarian state renounces the American model, as well as to the principle of separation of the powers in the state and entrusts the constitutionality control to a political body.

The Romanian Constitution in 1991, that restores the values of democracy and of the lawful state, regulates initially the constitutionality of laws in Article 140-145, according to the European model, the competence being entrusted to the Constitutional Court, this one being constituted as an independent public authority.

In Romania, the constitutional justice is carried out by the Constitutional Court. The core of the matter are the provisions of article 142-147 of Constitution and those contained in the Law no. 47/1992 on the organization and functioning of the Constitutional Court[16]. However, as we shall see below, the constitutional justice is not an exclusive attribute of the Constitutional Court, being only its most important component the constitutionality control of laws, to which are added the exclusive competencies conferred by Constitution and special laws.

The constitutional provisions through which the Constitutional Court of Romania became a reality were accepted after extensive parliamentary debates during the discussion of the Constitution draft. It is useful for our scientific approach to succinctly mention the maturity of these parliamentary talks, as a result of which the Constitutional Court has become a reality. The Parliamentary Committee on the Drafting of the Basic Law has made Title IV to be consecrated to the "Constitutional Council" under the influence of the French constitutional system.

The debates in the constituent assembly can be systematized, as shown in the literature in speciality, into four great ideas: "namely, a) the elimination of the institution, without any variant; b) the abolition of the constitutional council, with the entrusting of its controlling mission to the courts; c) entrusting a constitutional review to a commission; d) acceptance of the control of the laws' constitutionality, exercised by

[14] See the *Judicial Courier,* No. 32(April 29th 1912): 373-376.
[15] N.D. Comşa, "The notifications", *Judicial Courier,* No.32, (April 29th , 1912): 378.
[16] Republished in the Official Gazette no. 807 on December 3rd, 2010.

a distinct authority, council, court or constitutional court".[17]

Finally, the Constituent Assembly decided to create a specialized judicial body, namely the Constitutional Court. The essence of the reasoning behind this decision was as follows: "The Constituent Assembly has decided to institutionalize this form of control of constitutionality of the laws. Such control is inherent to the lawful state and democracy. In the post-war period, all the European states that have adopted constitutions have entrusted the control of constitutionality of the laws, not to the courts, but to a special and specialized body, so that the model offered in the project is a European model. By its makeup and its attributions, the Constitutional Court is not a "superpower", nor is it expensive – in relation to other institutions - through its nine members. Entrusting the control of constitutionality of the laws of the Supreme Court of Justice would result in the transformation of the jurisdictional body into a political body, the overordination of the judicial authority, the stimulation of arbitrariness on its part, the return to a form of desuet control, long time outdated in most of the democratic countries world "[18].

The doctrine has synthesized the following features and functions of the Constitutional Court:

a) *It is no other power in the state nor does it take any of the functions of the three powers*. The Constitutional Court is a typical example of non-formal and non-rigid interpretation of the theory of separation of powers in the state. The Constitutional Court cannot formally be classified into any of the three classical powers of the state but it contributes to the balance between them.

b) *It has a dual nature: political and jurisdictional*. The political nature derives from the way of designation of judges and from some attributions concerning the verification of the observance of Constitution in the procedure for appointing the President of Romania, the organization of the referendum, the mediation of the constitutional conflicts between the public authorities, the verification of Constitution's observance by the political parties, or in general, to verify the compliance with Constitution by some public authorities.

It has a jurisdictional nature because the members of the Constitutional Court act as veritable judges. At the same time, in the exercise of its functions, the Court applies a number of jurisdictions governed by the framework law for the organization and functioning which is supplemented by some regulations of the Civil Procedure Code. Also, the jurisdictional nature arises from the attributions of the Constitutional Court, especially in the field of constitutionality control of the laws and other normative acts.

c) *The role of the Constitutional Court as a public authority is to be the guarantor of the supremacy of Constitution*. This feature expressly results from article 142 paragraph (l) of Constitution. The Constitutional Court is not the only guarantor of Constitution, a very broad category that also characterizes the function of the Head of State. Thus, the provisions of article 80 paragraph (2) of Constitution show that the President of Romania is watching over the observance of Constitution. Our Constitutional Court is the guarantor of the supremacy of Constitution, an expression that underlines the foundation of the Court's functions.

d) It is the public authority that supports the good functioning of the public authorities in constitutional relationships, of separation, balance, collaboration and mutual control. In the sense of this feature, by amendments to the Constitution as a result of a new revision a new attribution was introduced to the Constitutional Court, namely: it solves the legal conflicts of constitutional nature between the public authorities [article 146 letter e) of the Constitution]. In order to achieve this, the Constitutional Court is independent of any other public authority; it only obeys the Constitution and its organic law (article l paragraph. (3) of Law no. 47/1992, republished]. The independence of the Court implies its right to decide on its competence and, moreover, the jurisdiction of the Constitutional Court cannot be challenged by any public authority. Therefore, there can be no positive or negative conflict of competence between the Constitutional Court and another public authority.

e) *The Constitutional Court is the only authority of constitutional jurisdiction in Romania* [article l paragraph. (2) of Law no. 47/1992, republished]. The Romanian constituent lawmaker has adopted the European model in the sense that constitutional justice is carried out by a single authority. The courts have some attributions that materialize in the right of appreciation of the admissibility of some unconstitutionality exception, but this does not invalidate the Court's monopoly on the constitutional justice, since only this public authority has the competence to resolve the constitutional disputes.

f) *The organization, operation and exercise of the duties shall be carried out in compliance with the principle of legality*. Our constitutional court exercises exclusively the powers provided by article 146 of the Constitution and those regulated by the organic law. The Court is not a supra constitutional court, its role is to interpret and apply the constitutional and law provisions.

In the same meaning, the provisions of Article 2 of Law no. 47/1992, republished, shows that the Constitutional Court ensures the constitutionality control only of the laws, international treaties, regulations of the Parliament and ordinances of the Government. The unconstitutionality can only be ascertained if the procedures of these normative acts violate the provisions or principles of the Constitution

[17] Ioan Muraru and Elena Simina Tănăsescu (coordinators), *România Constitution. Comments on the article* (Bucharest: C.H.Beck, 2008), 1370.

[18] Idem, 1373.

[article 2 paragraph (2) of the Law no. 47/1992, republished].

g) *The structure of the Constitutional Court is determined by the Constitution and the Law no. 47/1992.* As the Constitutional Court is independent in regard to any public authority, in a particular case only this institution can decide whether or not has the competence to resolve the constitutional dispute. Moreover, its competence cannot be challenged by any public authority (article 3 paragraph (3) of Law no. 47/1992, republished]. The Code of Civil Procedure regulates the resolution of negative or positive conflicts of jurisdiction between the courts. Taking into consideration the normative norms mentioned above between the Constitutional Court of Romania and, on the other hand, a court or other public authority, conflicts of jurisdiction cannot arise, because the exclusive competence in the matter of constitutional verification of the laws is in the right of the Constitutional Court, and this monopoly of constitutional jurisdiction cannot be challenged. The Constitutional Court has the power to decide on its jurisdiction in a specific case, but it cannot decline its jurisdiction in favor of another public authority in case the Constitutional Court is noticed with a request under conditions other than those stipulated by the Constitution or the organic law, the petition will be dismissed as inadmissible.

h) *In the exercise of its powers, the Constitutional Court regulates a work of interpretation of the law and Constitution*. The Constitutional Court cannot amend, complete or abrogate a law.

In its old drafting, before the revision of the Constitution, the Law no. 47/1992 prohibited the Constitutional Court to interpret the normative acts that are subject to constitutionality control. Naturally, the current regulation has removed this ban because the activity of verifying the compliance of normative regulations with the provisions of the Constitution made by the constitutional judge is in essence also a work for the law enforcement based on the interpretation of the legal norms.

The Constitutional Court participates in the achievement of the legislative function in the state, but not as a positive legislator, yet as a negative legislator whose purpose is to eliminate the "unconstitutionality venom" from a normative act. Therefore, by its attributions, the Court is not subrogated to Parliament's activity, because the amending, supplementing or abolishing of a law is an exclusive attribute of Parliament

i) *The Constitutional Court "supports the good functioning of the public authorities in constitutional relationships of separation, balance and mutual control"*. The principle of separation and balance of the powers in the state with all the criticisms expressed by some authors remains the foundation of the democratic exercise of state power and the main constitutional guarantee for avoiding the excess or abuse of power by any state authority.

The relationships between the state authorities are complex, but they must also ensure their proper functioning while respecting the principle of legality and supremacy of Constitution. In achieving this goal, it is very important to maintain the state balance in all its forms and variants, including as a social balance.

The separation and equilibrium of the powers no longer concern only the classical powers (legislative, executive and judicial). To these powers are added others that give new dimensions to this classic principle. The relationships between the participants to the state and social life can also generate conflicts that need to be resolved to maintain the balance of powers. Some constitutions refer to public law litigations (German Constitution - Article 93), to conflicts of jurisdiction between the state and autonomous communities, or conflicts of powers between state powers, between the state and regions and between regions (Constitution of Italy - Article 134).

Romania's Constitution speaks about the legal conflicts of constitutional nature between public authorities [(art. 146 lit. c)] and regulates the mediation function between the powers of the state exercised by the President.

The Constitutional Court is an important guarantor of the separation and balance of state power because it solves the constitutional legal conflicts between public authorities and through its attributions in the matter of the constitutionalilty control previous to the laws and the verification of constitutionality of the Chamber's regulations, it intervenes in ensuring the balance between the majority and the parliamentary minority, assuring effectively the right of the opposition to express itself.

j) *The Constitutional Court is a guarantor of the observance of the fundamental rights and freedoms*. In principle, three are the essential constitutional guarantees of the citizens' rights and freedoms established by Constitution:

a) the supremacy of Constitution;

b) the rigid nature of Constitution;

c) citizens' access to the control of constitutionality of the law and to the control of lawfulness of the acts subordinated to the law.

In Romania, the procedure for the unconstitutionality exception provides the indirect access of the citizens to constitutional justice.

The judicial control is an important way of guaranteeing the supremacy of the fundamental law, because by the nature of the attributions of the courts, it interprets and enforces the law, which also implies the obligation to analyze the conformity of judicial acts subjected to the judicial control with the constitutional norms. The courts therefore have competences in the matter of constitutional justice. We are considering not only the general obligation of the judge to observe and apply the constitutional norms or the powers conferred by the law to notify the constitutional court with an exception of unconstitutionality but in particular the

possibility to censure a legal act in terms of constitutionality.

The recent doctrine and jurisprudence in the matter examines the jurisdiction of the courts to verify certain legal acts in terms of compliance with the constitutional rules. An unconstitutional legal act is an act issued with excess power.

The unconstitutionality of a legal act can be ascertained by a court if the following conditions are met cumulatively:

1. the court to exercise its powers within the limits of competence provided by law;

2. the legal act may be individual or normative, may be mandatory or optional;

3. that in the case does not exist the exclusive jurisdiction of the Constitutional Court to rule on the constitutionality of the legal act;

4. the settlement of the case depends on the legal act that is criticized for nonconformity;

5. there is a reasonable, sufficient and pertinent reasoning of the court regarding the unconstitutionality of the legal act.

In case of the cumulative fulfillment of these conditions, the limits of the courts' attributions are not exceeded, but, on the contrary, the principle of supremacy of the Constitution is applied and efficiency is given to the role of the judge to apply and interpret the law correctly. Such a solution is also justified in relation to the role of the judge in the lawful state: to interpret and enforce the law.

The accomplishment of this constitutional mission, which is particularly important and difficult at the same time, requires the judge to apply the law in accordance with the principle of the supremacy of Constitution, therefore to control the constitutionality of the legal acts that form the subject of the litigation brought to justice or that is applied to the settlement of the case. The application of legal acts shall be carried out by the judge taking into account their legal force and observing the principle of the supremacy of Constitution. In this respect, worth mentioning the provisions of Article 4 paragraph (1) of Law no. 303/2004 obliging the magistrates that through their entire activity to ensure the supremacy of the law .

Another issue is to know what solutions the courts can issue, in compliance with the above conditions, when they ascertain the unconstitutionality of a legal act. There may be two situations: *In a first hypothesis*, the courts may be directly invested in verifying the legality of a legal act, as is case for the administrative litigation. In this case, the courts can determine by decision the absolute nullity of the legal acts on the grounds of unconstitutionality. *The other situation* concerns the hypothesis that the courts are not directly invested with verifying the legal act criticized for unconstitutionality, but that legal act applies to the settlement of the case brought to the court. In this case, the courts can no longer dispose the annulment of the unconstitutional legal act, but they will no longer apply it for the settlement of the case.

3. Conclusions

In our opinion, it is necessary that the role of the Constitutional Court as guarantor of the Fundamental Law to be amplified by new powers in order to limit the excess power of state authorities. We disagree with what has been stated in the literature in speciality that a possible improvement of the constitutional justice could be achieved by reducing the powers of the constitutional[19] litigation court. It is true that the Constitutional Court has made some controversial decisions regarding the observance of the limits of exercising its attributions in its charge, according to Constitution, by assuming the role of a positive legislator.[20] Reducing the powers of the Constitutional Court for this reason is not a legal solution. Of course, reducing the powers of a state authority has as consequence the elimination of the risk of misconduct of those attributions. Not in this way it is achieved within a lawful state the improvement of the activity of a state authority, but by seeking legal solutions for better performing of the duties that prove to be necessary to the state and social system.

Proportionality is a fundamental principle of the law explicitly consecrated in the constitutional, legislative regulations and international legal instruments. It is based on the values of the rational justice and equity and expresses the existence of a balanced or appropriate relationship between actions, situations and phenomena, being a criterion for limiting the measures disposed by the state authorities to what is necessary to achieve a legitimate aim, thus being guaranteed the fundamental rights and avoided the excess power of state authorities. Proportionality is a basic principle of the European Union law being explicitly consecrated in the provisions of Article 5 of the Treaty on the European Union. [21]

We consider that the express regulation of this principle only in the content of the provisions of Article 53 of Constitution, with applying on the restriction of the exercise of some rights, is insufficient to give full meaning to the significance and importance of the principle for the lawful state.

It is useful, in a future revision of the fundamental law that, at article 1 of the Constitution to be added a new paragraph stipulating that *"The exercise of state power must be proportionate and non-discriminatory"*. This new constitutional regulation would constitute as a genuine constitutional obligation for all state

[19] Genoveva Vrabie, "The juridical nature of the Constitutional Courts and their place within the public authorities system", *Journal of Public Law*, no.1 (2010): 33.

[20] We are referring for exemplifying to the Decision no.356/2007, published in the Official Gazette no.322 on May 14th 2007 and to the Decision no. 98/2008 published in the Official Gazette no. 140 on February 22nd, 2008.

[21] For developments see Marius Andreescu, "Proportionality, principile of European Union law", *Judicial Courier* no. 10, (2010): 593-598.

authorities, to exercise their powers in such a way that the measures adopted be within the limits of discretionary power recognized by law. At the same time it is created the possibility for the Constitutional Court to sanction the excess of power in the activity of the Parliament and Government, by the constitutionality control of the laws and ordinances, using as a criterion the principle of proportionality.

In the attributions of the Constitutional Court may also be included the one to rule on the constitutionality of administrative acts exempted from the legality control of the administrative litigation courts. This category of administrative acts, to which Article 126 paragraph 6 of the Constitution refers to and the provisions of Law no. 544/2004 of the administrative litigation, are of great importance for the entire social and state system. Consequently, a constitutional review is necessary because, in its absence the discretionary power of the issuing administrative authority is unlimited with the consequence of the possibility of an excessive restriction on the exercise of the fundamental rights and freedoms or with the violation of some important constitutional values. For the same reasons, our Constitutional Court should be able to pronounce on the constitutionality and the decrees of the President for establishing the referendum procedure.

The High Court of Cassation and Justice has the power to take decisions in the appeal procedure in the interest of the law that are binding on the courts. In the absence of any verification of legality or constitutionality, the practice has shown that in many situations the Supreme Court has exceeded its duty to interpret the law, and through such decisions has amended or supplemented the normative acts by acting as a true legislator, violating the principle of separation of powers in the state[22]. In these circumstances, in order to avoid the excess power of the Supreme Court, we consider that it is necessary to assign to the Constitutional Court the power to rule on the constitutionality of the decisions of the High Court of Cassation and Justice adopted in the appeal procedure in the interest of the law.

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[22] For developments see Andreescu Marius, "Constitutionality of appeal in the interest in the name of the law and other decisions pronounced", *Judicial Courier* no. 1 ,(2011): 32-36.